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ABSTRACT

This volume presents a series of papers by educators involved with the issues of race, sex, and national origin desegregation. The focus is on provision of equal educational opportunities and the development of quality integrated education. The papers included are: (1) "Advocating Change in the White Male Club" by Bruce Gibb and Robert Terry; (2) "Education: Integration, Welfare and Achievement" by Barbara A. Sizemore; (3) "Cultural and Academic Stress Imposed on Afro Americans: Implications for Educational Change" by William C. Parker; (4) "Toward the Development of Minimal Specifications for Lau-Related Language Assessments" by Josue M. Gonzalez and Ricardo Fernandez; (5) "Impact of Desegregation: A Historical and Legal Analysis" by J. John Harris, III; (6) "Warmest Personal Regards" (anonymous); (7) "New Directions in Desegregation Litigation" by Martha M. McCarthy; (8) "The Burger Court and School Integration, 1978: The End of the Second Reconstruction Period, 1954-1974" by Frank Brown; (9) "Desegregation: Futuristic Considerations" by David G. Carter; and (10) "U.S. v. Board of School Commissioners, Indianapolis: A Case in Point" by Frank D. Aquila. (MK)

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SCHOOL DESEGREGATION: A MODEL AT WORK

Editor, Frank Aquila
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INTRODUCTION

The School of Education at Indiana University has for the last two years worked with the urban school districts in Indiana in the arena of equal educational opportunity programming. These programs have included technical assistance on desegregation-related problems in individual, seminar, workshop and conference formats. Additionally, during this last year an intensive training program has provided in-depth services for Indianapolis teachers.

In the design and implementation of these programmatic efforts, we have had the opportunity to work with many outstanding educators. Their knowledge and understanding of the issues involved with race, sex and national origin desegregation was of the first order. We , therefore, asked them to develop their presentations into a written format suitable for sharing with others interested in the provision of equal educational opportunity and in the development of a quality integrated education.

At the 1978 American Education Research Association Conference, several papers on school desegregation were presented. The scope, style and thrust of the ideas in these papers also made them appropriate for inclusion herein.

It is hoped that these articles will provide a reading source for graduate level classes on school desegregation, as well as for staff in-service activities in local school districts. Presently developing courses at Indiana University have utilized many of the individual articles. It is our belief that by providing them in a single volume, we will enable others to utilize them. Hopefully, they will serve to stimulate and encourage others to expand upon the ideas presented.

F.D.A. Summer, 1978

ADVOCATING CHANGE IN THE WHITE MALE CLUB

*Bruce Gibb, MBA

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The authors present their approach to implementing a change strategy in the "white male club". The white male club is identified as those institutional groups which control the resources and power in our society. (For a more complete discussion of this phenomenon it is suggested that the reader review Terry, White Male Club, 1974.) Gibb and Terry discuss the major components of the white male club as well as many of the techniques used by the club to retain power. The major thrust of the essay is to provide alternative approaches to resolve the societal problems caused by the white male club, basically the exclusion of females and minorities from positions of power. The authors provide several approaches toward change. These include: (1) cultural approach composed of four subsets: moral, social, emotional and educational; (2) economic: (3) political; and (4) professional-technical including a legal subset. The authors close with a discussion of the organizational approaches necessary to implement their strategy of change.

Organizational change is never easy. It is especially difficult when the issues are as thorny and emotional as racism and sexism. What follows is a statement of how our multi-racial female/male consulting team, operating external to organizations, understands, advocates and implements a comprehensive affirmative action change program.

The focus of this essay will be limited to organizational rather than societal change problems. Our reflections grow out of experience with industrial, educational, governmental, health and religious organizations. The paper will be organized into four sections: A. What is the problem? B. What are alternative change approaches? C. What is our approach?

A. THE PROBLEM

Any change effort requires clear problem definition. What needs changing? What criteria should be used to measure the intervention's effectiveness? In our view, organizational consultants frequently fail to address racism and sexism effectively because they focus on the victims. They unfurl elaborate plans to upgrade and assist minority men and women and white women to fit and succeed in a given organization. The organization itself receives minimal attention. Although some victim-focus programs have merit, we have learned that they are only minimally effective in curtailing racism and sexism. A different orientation and plan is required which primarily focuses on the traditional ways of "doing business."

Large complex organizations in the United States can accurately be characterized as "white male clubs" (WMC) (Terry, 1974). The WMC, more than the victims of the club, requires analysis and change. Of course, the victims have particular issues and problems to face. However, most of these directly relate to some club behavior. For instance, club behavior denies authority to some club members, albeit in different and harder to pinpoint ways.

To develop an understanding of what we mean by the club, we begin with a brief statement about the characteristics of an authentic person in an authentic society. We can then see how the club violates that authenticity and what would be required to shift from a club to a viable, humane organization.

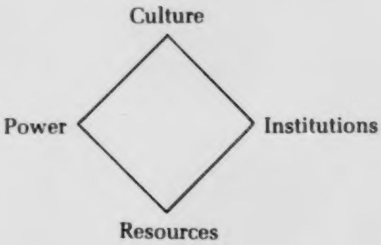
To be authentic in an authentic society requires four things:

- Adequate resources for living (includes food, shelter, clothing, and any other resource necessary to function effectively in society).
- Sufficient power for self-determination (includes both the capacity to make decisions and the ability to carry them out).
- A positive and secure cultural identity (includes the willingness to affirm another's identity while affirming one's own).
- Institutional and personal support (includes family, school, peer groups, and other structured relationships).

An authentic society would be characterized by:

- Equitable distribution of resources (by race and sex for purposes of this paper).
- Shared power
- Cultural pluralism
- Flexible and responsive institutions

The four variables can be graphically presented by the following diagram:



The denial of authenticity creates alienations and/or inauthenticity. Alienation occurs when a person is unaware or vaguely aware of the exclusions, dependency and manipulation by a hostile social system and unable to participate authentically in that system. Inauthenticity exists when there is the appearance of authenticity but the underlying reality is alienating (Etzioni, 1968). Increasingly today, organizations are inauthentic, making it extremely difficult for change agents to uncover the underlying alienating forces at play within them.

The WMC image captures many alienating and inauthentic dimensions of large organizations today. Organizational *resources* are disproportionately distributed to white males; *power* is held by white males; organizational *climate* and *ethos* legitimate selected white male values and behavior; and *institutional policies, practices* and *programs* support and reinforce white male ascendency. To protect the WMC, club members, drawing on club traditions, often unintentionally rationalize their behavior with rhetoric about non-discrimination, equal opportunity and victim help programs. What escapes challenge is the club itself.

To challenge racism and sexism in organizations, consultants and other change agents must have a firm grasp on the definition of racism and sexism and be keenly aware of the multiple ways these twin realities express themselves organizationally. Our definitions of racism and sexism combine the above four characteristics of the club.

> Racism and sexism exist when one race or sex group, intentionally or unintentionally, inequitably distributes *resources*, refuses to share *power*, maintains closed, unresponsive and inflexible *power*, maintains closed, unresponsive and inflexible *policies, practices*, and *programs* and imposes ethnocentric and gendercentric *culture* on another race or sex group for its supposed benefit and justifies these actions by blaming the other race or sex group.

The club concept transforms the formal definitions into observable organizational reality. Space does not permit a complete exposition of club behavior. A few illustrations will have to suffice.

Resource distribution. — The club frequently uses a divide and control strategy with resources. An organization has a limited amount of money in the affirmative action (AA) program. Although new groups come under the AA mandate, that amount remains the same. Nationally this phenomenon is visible with the enactment of Title IX of the Education Amendments of 1972, the non-sex-discrimination in education laws. The money to implement Title IX regulations comes from money previously allocated for Title VII, on race. There was no new money to support Title IX. Minorities get pitted against women, with minority women caught in an impossible dilemma. And the club goes on.

Power sharing. — A client group of black women reported that despite their management positions they were not involved in decision-making. After some investigation, they discovered that while men were in the company sauna, they made decisions which were later announced to them at "staff meetings". Voila!

Sauna power! In other organizations it's the "old boy network," athletic club power or some other equivalent.

There is also the practice of establishing new positions for minorities or white women without adequate financial resources and staff. Power has not been shared. Or there is the practice of placing minorities in buffer positions — urban affairs, personnel departments, AA offices — leaving the primary decision-making for trusted club members.

Cultural ethnocentrism and gendercentrism. — Club members have a set of norms and values they expect newcomers to adhere to prior to granting them full club membership. Club leaders expect certain dress styles (Malloy, 1975) if someone is to move to higher club levels. John Molloy, author of *Dress for Success* researched this phenomenon and advises minorities.

> If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (p. 152)

Language patterns illustrate ethnocentric behavior. Organizations usually have a double standard of swearing. "Goddamn" is acceptable; "mother fucker" is not. And then there is swearing in front of women. In either case, the prerogative of deciding appropriate behavior rests with club members. Outsiders clearly recognize whose club it is and who is setting the standards.

The club values rationality (usually contrasted with emotionality rather than irrationality), competition and individual success. Minority males and women are depicted as "too emotional," they have an "attitude," are clique oriented (they group together a lot), are low achievers (they are not as hard drivers as the other club members). See Terry (1974 and 1975) for more on club values.

The definitions of racism and sexism and their activation through club behavior have important implications for analysis and change. First, by focusing on the WMC, white males per se are not the problem. However, the club analysis does suggest that any white male who supports the club becomes part of the problem.

Sexism in American society is a male club problem; racism is a white club problem. Thus the only kind of sexist a woman can be is a male sexist. The only kind of racist a minority can be is a white racist. Neither minorities nor white women control the club but they can be co-opted or voluntarily defend the club against those women and men, minority and majority people who are moving toward an authentic organization.

Second, although the definitions of racism and sexism are identical, it is a mistake to assume that the historical realities or the change implications are identical. Some obvious contrasts make the point:

> Minorities tend to be ghettoized; women are widely distributed through the country.

Women tend to be idealized; minorities ignored and discounted.
Minorities are more likely perceived to be violent; women more peaceful.
Women have particular issues such as rape, control of one's body, and abortion that differ from racial issues.

A consultant cannot assume that minority men and women will form a complete natural alliance with each other or with white women (Firestone, 1970). Different constituencies will address differing issues. Overlaps occur around common self-interest.

And third, the club analysis pinpoints ways that members apparently benefit from racism and sexism. They also lose. It is difficult to separate racism and sexism from poor management. Newcomers to the club often raise questions about a club practice that appears on the surface to be the result of racial and sexual discrimination. Upon investigation, the issue often is not discrimination. Everyone is equally treated poorly and unfairly! A properly conducted AA program, coupled with broader organizational sensitivities provides a vehicle for club members as well as newcomers to be authentic, not in the old club, but in an effective humane organization.

Let us now turn to examine some of the common methods used to fight racism and sexism in organizations. Almost all of these approaches have an implicit definition of the problem which differs from that presented above. These definitions are limited by a narrow interpretation of Title VII of the Civil Rights Act of 1964. They focused on discrimination rather than the racism and sexism in the club which results from past and present discriminatory behavior.

B. ALTERNATIVE SOLUTIONS TO THE PROBLEM

The following are descriptions of eight approaches observed in organizations which are responding to equal opportunity law. These will be brief characterizations rather than complete descriptions. In each description, the consultants' target group will be identified and the major process described. The eight approaches are organized under the four dimensions which are used to describe the club.

1. Cultural approaches. — The major focus of the cultural approaches are the values, beliefs, feelings and skills of *individual* members of the organization. The basic assumption is that if individuals change, the organization will change.

Moral approach. — Racism and sexism are ethical and moral issues traditionally beyond the purview of most organizations, with the exception of religious organizations. With the perception that equal opportunity laws have invaded the moral sphere, organizational consultants advise executives and managers to hire and train affected classes because it is morally right to do so. Arguments include invocations of the basic principles in the doctrine of free enterprise and equal opportunity. Guilt becomes a major motivator induced by vivid portrayals of pathetic conditions of the affected classes. Some of the forums through which the word reaches the members of the organization are presidential speeches, house organ articles, and managerial visits to the affected class institutions and communities.

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Social approach. — Practitioners of the social approach emphasize social acceptance of minorities. At home, questions such as "how many of your friends are black" and on the job, statements like "he is black and we get along very well" illustrates this approach. The major focus is on developing the social skills of the affected classes so that they are congenial to the majority and male members of work groups. Courses designed to help advance women in management include learning how to "get along" with the male supervisor. The major forums for these practitioners are internal or external group training sessions to acculturate the affected classes.

Emotional approach. — The social approach relates to one form of the emotional approach by focusing on the affected classes to reduce the rage or hostility these groups may have which will inhibit their social and therefore organizational acceptance. Also in this tradition but having a diametrically different focus are various forms of ethnotherapy. These therapies work on the prejudices and emotions of *white males* which affect their decisions regarding the affected classes. The variations range from ethnotherapy (Cobbs, 1972) where a white in a group is confronted and challenged by minorities to transactional analysis where the individual client reduces the "contamination" of his adult ego state by parental myths about the affected classes (Roberts).

Educational approach. — Training programs to equip the affected classes with the technical knowledge and skills to perform effectively in organizational roles are most frequent. These programs are most often conducted in-house. However, federally financed or assisted job-training programs are available outside the organization. Internship programs for affected classes also fit under this approach.

In a few organizations, white male managers are being trained to manage the AA function as part of their managerial responsibility. These management development courses usually include immersion in the legal requirements and an understanding of where women and minorities "are coming from," their backgrounds and socialization.

In sum, these four approaches focus on the individual and his/her interpersonal or work group relationship with members of the affected classes. With the exception of the ethnotherapies, the usual assumption underlying them is that the affected classes need to be resocialized or trained to "fit" into the organizational culture. They are usually carried out in the organizational setting by internal trainers or external consultants.

2. Economic approaches. — The use of economic resources usually in the form of high salaries to capture a share of the affected classes has been used but found to be ineffective. It makes the organization vulnerable to discriminatory suits and limits the upward mobility of members of the affected classes.

Another economic approach is used to overcome white-male manager's emotional and social resistance to acting assertively on AA programs. Economic incentives in the form of merit increases, profit sharing, and annual bonuses become in part contingent upon achievement of AA goals and within timetables set by the managers themselves. These objectives constitute part of a set in a "management by objectives" process.

As yet, the possible economic benefits which may accrue to an organization are not documented by empirical research. The organization may benefit economically from increasing the pool of human resources by breaking the monopoly of white males, obtaining greater investment of all employees from participation in decisions, and decreasing the alienation of affected classes who perceive preferential protection of white males. If this hypothesis were supported by research, it would be a powerful economic incentive to move effectively and rapidly on AA programs.

The limited economic incentives now employed are used by top executives to pressure unwilling line managers to achieve affirmative action goals. This method is usually found only in the most committed and/or authoritarian organizational regimes.

3. Political approach. — Many members of affected classes in organizations despair that fundamental changes will not occur as a result of cultural approaches. They have somewhat greater expectations from economic sanctions. Their real hope lies in raising the consciousness of the affected classes, organizing and mobilizing them to make clear and consistent demands on the organization. They are the organization "militants" and frequently find themselves isolated and frustrated (Alinski, 1969). This political approach involves working with each of the affected classes separately. Each class develops demands which can be met by the organization. They commit themselves to take an escalating set of actions should the demands be refused. The risks are high, few inside an organization are willing to play.

4. Professional-technical approach. — The basic assumption underlying this method is that changes in the procedures, especially personnel procedures, will lead to compliance with the law. The external consultant, frequently a personnel or legal expert specialized in equal opportunity laws, examines the organization's procedures and practices. Recommendations for changes include redesigning application forms, opening up unused recruiting sources, validating testing procedures, analyzing jobs, redefining criteria and setting new standards, revising performance evaluation process and criteria, etc. These consultants work with and through the human resource or personnel departments to provide line managers with the procedures to be non-discriminatory regarding the affected classes.

A final technical approach is legal. Organization legal staff take action on a case by case basis. This approach assumes that the organizational structures, policies, procedures, and practices are in compliance and that the probability of success in winning favorable judgements is high.

The external legal approach takes the form of a lawyer who represents the affected classes and presses the organization by referring complainants to federal, state and city agencies or filing individual or class action suits in the court. .

The success of the various approaches described above depends in part on the specific conditions of the organization. In general, no one approach appears to be effective when used alone. The moral preachments are hollow without changing the reward structure to reinforce anti-racist and anti-sexist behavior.

Emotional catharsis and introspection are sterile without recognizing how the traditional organization practices and processes perpetuate racism and sexism. Education of affected classes becomes endless unless a hostile social psychological climate becomes hospitable. Political action, especially in a contracting economy, without an educational process for white males so they can appreciate that the affected classes have eyes to see ways in which the organization can be improved for all, is at least risky and at worst personally dangerous.

All these approaches are important and useful. Although we have not systematically researched it, our experience supports the affirmation that the greater number of these approaches used, the more effective the AA program outcomes. In the following section, we will combine these approaches in an outline of the strategy we follow in helping an organization achieve effective AA results.

C. ORGANIZATIONAL APPROACH

This strategy includes in an intervention sequence all the approaches described above. In the outline of the stages in this sequence, we identify the various approaches in parentheses.

1. Access. — Most of our contacts with potential clients come from referrals or from those who have read our publications. Recommendations usually come from executives and managers, minorities and women we have worked with who encounter colleagues frustrated with the task of developing an effective or trying to implement an ineffective AA program. The frustrated managers usually perceive the task to be one which can be accomplished by experts through adjusting the personnel procedures and practices (professional-technical approach).

In the first encounters with the client, the white male consultants begin to provide executives and affirmative action managers with a broader understanding of themselves and the task (emotional and educational approach). They press the leaders to define the benefits which may accrue to the organization in addition to those which are contingent upon compliance with the civil rights laws. The enthusiasm and energy engendered at this point usually leads to a plan to share their newly acquired understanding with other line executives and managers. Seminars of three days in duration are scheduled to accomplish several objectives: build a common language and understanding of the problem, assess the current equal opportunity status of the organization, and develop an action plan for developing and implementing their AA program.

2. Diagnosis. — In preparation for the seminar, the minority and female consultants interview minorities and women who will participate in the seminar to build legitimacy with them, to obtain their perceptions of actual personnel and management practices, and to determine their needs and aspirations (political approach). At the same time, white male participants are interviewed to assess their perception of the problem and affirmative action, to identify the practical and emotional difficulties (emotional approach) they experience as they attempt to manage a multi-cultural two-sex work force, and to determine the issues they feel should be addressed in the seminar. The socio-psychological

climate can also be tapped with comprehensive survey instruments we have developed for this purpose.

Simultaneously, the affirmative action staff develops the statistical data to document racism and sexism. This includes parity and utilization data by job category, applicant flow, hiring, turnover, and promotion rates. Instances of current discriminatory practices and procedures are written up as case studies or critical incidents to illustrate vividly how the organization reached its present condition.

3. Planning. — With the data from interviews and the AA office, the consultants, executives and representative minorities and women structure the three-day seminar. The first day builds awareness of the issues and a common framework develops (educational approach). During the second day, minorities and females provide a perspective which limits denial and rationalizations and gives managers some straight feedback on their behavior (emotional approach) as they scrutinize the organizational structure and dynamics. The final day they share the responsibility with managers for planning a process to create a program which has the commitment of all groups, has adequate human and financial resources, and has high organizational priority.

A planning group selected from seminar participants with female and/or minority leadership (political approach) is charged with the responsibility of drafting in broad outline:

A participatory process for setting goals and timetables.

A procedure for holding line managers accountable for their achievement and incorporating results in this area as a criterion for determining merit increases or bonuses (economic approach).

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EDUCATION: INTEGRATION, WELFARE AND ACHIEVEMENT

Barbara A. Sizemore

This paper traces the general status of the black American in the American educational system, providing a general overview of the American experience of the black. The educational focus deals with integration and desegregation with regard to concern over the welfare system and achievement mode of the black child. The author provides a review of the major educational contributors regarding equal educational opportunity concerns with an emphasis on the relationship of social inequities as they affect the education of blacks. The author's summation clearly calls for the restructuring of the public school system. Her thesis appears to be that an integrated society will result only when we attack the source of social inequity which is strangling our society.

The black American's status in the U.S. social order results from the internal contradiction of American democracy, the incompatibility of the economic paradigm and the political ideology and institutional inaccessibility.[1] These conflicts can no longer be denied but must be confronted. Integration is but one manifestation of the great American Dilemma.

The long war for political, economic and social parity has been fought in this milieu of contradictions centering largely around three opposites: (1) the political ideology which states that all men are created equal with certain inalienable rights to life, liberty and the pursuit of happiness versus the economic paradigm which is a contrarily interdependent competitive model guaranteeing losers; (2) an achievement orientation based on the notion that hard work assures success on standardized tests norm-referenced on the winning group, emphasizing its talents and gifts even when inappropriate for the task at hand versus an ascriptive continuum based on race, sex and socio-economic status which serves as the gatekeeper to the opportunities of the system and which keeps the losers losers; and (3) the elitist nature of the governing institutions versus the mass ideology inherent in the meaning of democracy.

According to Davis, the basis for many of the problems faced by blacks is a lack of access to social institutions. He says that institutional failure has produced a higher theoretical and empirical frequency of social problems for blacks and social problems can be resolved, lessened and prevented and the needs of the black population met not through integration but rather via reversing institutional inaccessibility.[2] An institution is a public system of rules which defines offices and positions with their rights and duties, powers and immunities.[3] Institutional inaccessibility is defined as a situation in which one's primary and/or secondary human needs are prevented from being met via the normative social institutions. Davis explains this:

> When social institutions are closed to certain groups in the population, extra-legal mechanisms and processes are sometimes proposed, developed and implemented in an effort to increase access. Some of the extra-legal mechanisms are the Equal Rights Amendments for blacks and women, Voting Rights Acts, Civil Rights Acts, Supreme Court Decisions and the like.[4]

Davis charges that black and other minorities will continue to reflect disproportionately high frequencies of certain deprivation- related problems, unless alterations in social problems and the societal forces that precipitate them occur.

The 1950's and 60's was a period of struggle, intense struggle for justice by the black minority. Justice expresses a kind of equality requiring that in their administration, laws and institutions should apply equally to those belonging to the classes defined by them. Rawls states two principles of justice:

> First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[5]

The first principle is governed by the Constitution and does not lend itself to much argument morally. It is the operationalization of the second principle which lies at the crux of the present debate over affirmative action, open admissions and the Equal Rights Amendment. Presently, white men of European descent have disproportionate access to positions and offices in chains of command than do other groups, based not on merit or qualifications other than race, sex and affluence. Rawls says that the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society. The society is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.[6] Downs claims that a Paretian optimum, the condition wherein no transaction between private parties can make someone better off without harming someone else, can be reached only if government intervenes in the free market.[7]

If social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage and attached to positions and offices open to all, and if a Paretian optimum can exist only through government intervention, how do blacks and minorities get the government to take such effective action? There are two different distributions that influence the allocations of resources, according to Downs: the distribution of votes and the distribution of money.[8] Because of majority rule, a Paretian optimum is never reached in a democracy.

For fifty-eight years blacks worked to overturn the 1896 Supreme Court decision in *Plessy v. Ferguson*, and, finally in 1954 that same court removed segregation from its de jure status in *Brown v. The Board of Education of Topeka*. During the reign of "separate but equal", there was little response from the society over the blatant and obvious inequities in black and white education nor regarding excessive and unnecessary busing of black children through the segregated areas.

Desegregation and integration are not synonyms and the Civil Rights movement never made it clear what its definition of integration was. Integration demands an end to elitism in all of its forms: racism, sexism and class privilege. Racism is sometimes defined as an accommodation mechanism used by a race to exclusively maintain, control and preserve its power while subordinating the excluded races within its sphere of influence to its power demands.[9]

Accommodation is defined as a process of mutual adaptation between persons or groups, usually achieved by eliminating or reducing hostility as by compromise, arbitration, adjustment of differences or reconciliation. Handlin gives two definitions of integration.[10] One refers to an open society as a condition in which every individual can make the maximum number of voluntary contacts with others without regard to qualification of ancestry. The other is racial balance, that condition where individuals of each racial or ethnic group are randomly distributed throughout the society so that every realm of activity contains a representative cross section of the population. The former is integration, the latter is desegregation.

Integration demands solutions which eradicate segregated housing, deny unequal job opportunities, eliminate inadequate medical and educational services and remove unequal taxation demands. It requires the destruction of all barriers to association except those based on ability, taste and personal preference. Integration affords free choice to equals with the same limitation; desegregation assures free choice to the superordinate. With no definition preferred by the Civil Rights Movement, desegregation models were implemented giving the superordinate groups (those with power) the right to move away or out of the public schools whenever desegregation commenced. The school cannot be examined apart from the total social reality. Segregation in schools is a result of residential isolation in *de facto* situations. By limiting the process to education, resolution of the housing problem was deferred until urban renewal, urban homesteading and model cities programs could begin the removal of the black poor from the central cities. Early desegregation efforts of the northern public schools did become entangled with residency isolation, political patronage systems, the exodus of whites and the consequent loss of capital and resources, the expansion of the ghetto and the threat of the emergent black political force. For, as each new white community faced black inundation the cry for integrated schools could be heard.[11]

The present argument generated by James Coleman around white flight is moot, for the hidden truth is that the U.S. had been faced with the "progressive ghettoization of whole series of great urban conglomerations"[12] at the time of the 1954 decision. Whites had been fleeing the cities for suburbia with the blessings of the federal treasury via FHA and the blacks had been concentrating in the central cities in the mammoth federal housing projects. In 1951-52 for the first time in the urban centers, the schools of Washington, D.C. became 53% black. Predictions were made about the recurrence of this condition in city after city threatening white political control. These were the conditions which influenced the thinking of the Justices of the Supreme Court in 1954. And the 1954 decision reflects a racist bias:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn.

This language implies that segregation does little or no harm to white children; therefore, segregation is supportive to whites. If an institution supports white superiority, how can that same institution dispel black inferiority? And this is the rub. Desegregated schools can be as racist as segregated schools because the situational factors as exhibited in educational structures and by educational programs are identical.

When the Civil Rights movement was faced with this anomaly—the fact that their argument said that blacks were inferior and had to sit next to whites to learn—they insisted that they meant only that whites would only support schools where their children were learners. Consequently, the Civil Rights movement never addressed the structural problem nor confronted the rigidity and differentiation of the educational structure which maintains its character and resists outside forces. Since power in these organizations is vested in an oligarchical rather than a democratic system and since people in it are rewarded according to their position in this hierarchy, the school meets the interests of these people more than it meets our commitment of universal education. The plain fact is that the present educational structure does not fit our multilingual, multi-cultural environment because it was designed to benefit white affluent Anglo-Saxon Protestants. It does not work for those who differ from the norms and standards of this group. Consequently, this minority has a built-in advantage which it does not want changed. At first there was a fear that integration would destroy this advantage. As it became clearer that desegregation models based on quotas would maintain the white majority and retain these benefits, resistance began to wane. Only resistance to the poor remained. Since most black public school students are poor, this continues to be a problem.

The standards of American society are severe and a portion of our population is held in low esteem and regarded with suspicion. These people are "generally relegated to slums or skid rows so that respectable and essential citizens can carry on their corporate life undisturbed by their own apprehensions.[13] The poor are always alienated from normal society, and the black poor are rejected on the basis of class and race. Therefore, the Civil Rights movement should not have been disappointed in Coleman's report, Equality of Educational Opportunity (EEOR). It made four major points about American education in 1965:

(1) Most black and white Americans attended different schools.

(2) Despite popular impressions to the contrary, the physical facilities, the formal curriculums, and most of the measurable characteristics of teachers in black and white schools were quite similar.

(3) Despite popular impressions to the contrary, measured differences in schools' physical facilities, formal curriculums and teacher characteristics had very little effect on either black or white students' performance on standardized tests.

(4) The one school characteristic that showed a consistent relationship to test performance was the one school characteristic to which most poor black children had been denied access: classmates from affluent homes.[14]

Dr. Ruth Hayre, former District Superintendent of the Philadelphia Public Schools, reminds us that from the end of World War II through 1965 black students in urban areas were crowded into double shift schools with hardly enough used and abused books in crumbling buildings ill kept and unattended with teachers who were dodging the Asian wars in which the U.S. had engaged itself. A student who entered in the public schools in the first grade in 1950 was born in 1944, graduated from high school in 1962 and college in 1966. The student who entered first grade in 1965 was born in 1959 and has not graduated from high school yet.[15] Her point is very relevant to the present and to the Coleman Report. If the point in time of the investigation was 1965, the building of new schools, the raising of property taxes to pay for the increase in enrollments and the increased spending which accompanied these changes may have narrowed the previously existing unequal expenditures. Secondly, if the large school districts were those not responding to Coleman (notably Chicago) would these inequities be shown? Lastly, Dr. Hayre's comments speak to the problem of testing, although obliquely. How could students who had spent all of their public school years on double shift with inadequate supplies and textbooks do better than their predecessors on standardized tests? If the tests are standardized on certain curricula demanding a certain amount of time and this time is shortened, what happens to what is taught? This brings us to the problem of achievement in integrated (desegregated) schools.

Black social scientists are conspicuously absent among researchers who measure the effects of school desegregation. This is unfortunate since their involvement might mean the consideration of more relevant questions about the desegregation process and its effect on students.[16] St. John reviewed more than 120 studies of the relation of school racial composition and the achievement, attitudes or behavior of children. On the basis of the evidence collected and studied, biracial schooling must be judged neither a demonstrated success nor a demonstrated failure.[17] St. John reports the following:

> As implemented to date, desegregation has not rapidly closed the black-white gap in academic achievement, though it has rarely lowered and sometimes raised the scores of black children. Improvement has been more often reported in the early grades, in arithmetic, and in schools over 50% white, but even here the gains have usually been mixed, intermittent, or nonsignificant. White achievement has been unaffected in schools that remained majority white but significantly lower in majority black schools.
>
> Biracial schooling is apparently not detrimental to the academic performance of black children, but it may have negative effects on their self-esteem. It is not merely academic self-concept in the face of higher standards that is threatened, but also general self-concept. In addition, desegregation apparently lowers educational and vocational aspirations. It is possible however, to interpret a reduction of unrealistically high aspirations as an overall gain. Moreover, there is some evidence that in the long run desegregation may encourage the aspiration, self-esteem and sense of environmental control of black youth.
>
> The immediate effect of desegregation on interracial attitudes is sometimes positive but often negative. Thus white racism is frequently aggravated by mixed schooling. Friendship is somewhat more likely to develop among younger children or those who have been long desegregated, but at the secondary school level there is a great range in the degree of racial cleavage, community to community. In some schools there is considerable interaction and mutual respect. Among blacks the most ingroup in their friendship patterns are girls and those in classes with very few of their own race. Among whites the most ingroup are boys, but the interracial behavior of both sexes is much affected by the social class congruity of the races in the school.
> But although desegregation is not to date a demonstrated success, it is not yet a demonstrated failure. There is as little evidence of consistent loss as there is of consistent gain. Further, in spite of the large number of studies, various limitations in design weaken the best of them. Thus in a sense the evidence is not all in.[18]

One reason why desegregation seems not to affect the learning of the students may be the failure to change the structure of schools to accommodate learners who differed from the norms of the norm-referenced curriculum and standardized tests. St. John, herself, notes that there are serious problems in the use of standardized and IQ type tests in desegregation research. She says:

> If the tests have not been standardized and validated on a similar population (and they rarely have), they may have low predictive validity for black children or differentiate poorly among them. Though the comparison is between black children and other black children, rather than between black and white children, the tests may nevertheless show unreliable or unreal differences or fail to show differences that are reliable and real.[19]

The refusal to examine the stratification consequences of the norm-referenced curriculum and its concomitant effect, standardized tests, is probably due to the relation between schooling and the availability of opportunities. As a result the school is able to respond to human need only to the degree that that particular human being approaches the norms and standards of white affluent Anglo-Saxon Protestants. The failure of affirmative action and open admission is due to our refusal to deal with this phenomenon also.

The entire structure needs to be changed so that it is compatible with what we know about human growth and development. Bruner says that instruction should assist growth.[20] If this is so, what should a constructive responsive teaching-learning environment be like? Sarason says that any attempt to introduce change into the school setting requires, among other things, changing the existing regularities in some way. Several questions should be answered, he advises. What is the rationale for the regularity? What is the universe of alternatives that should be considered?[21] Why, then, are our children grouped according to ages in grades? What does age have to do with learning? What is a norm? What is a grade? What do they have to do with learning and growing? Why is only the experience of Anglo-Saxons prized and considered worthy? Why are Europeans exalted and glorified over all other men? Why is the administration of the school hierarchial and undemocratic? Why is everyone taught the same thing, at the same time, in the same way with the same material and the same teacher for the same amount of time?

We need to admit that every human being is unique and different, with differing rates of growth and patterns of development. This being so, the norm referenced curriculum and norm referenced testing need to be discarded. Assessments need to be made of students' gifts and assets as well as their weaknesses and deficiencies. Longitudinal studies of student growth need to be kept in order to determine what is "normal" for that student. Teachers need to be taught how to use these to plan an individualized curriculum. Skill mastery groupings need to be formed in all of the four symbol systems: words, numbers, images and notes, with teachers who are skilled in participant observation and procedural knowledge. Presently, teacher training programs do not afford opportunities for teachers to demonstrate alledgedly learned skills.

Learners learn by imitating, modeling or demonstrating as well as by memory, recitation and recall and rote. Procedural knowledge deals with the know-how in contrast to the know-what.[22] Once differences in individual learners are admitted, a different kind of grouping more responsive to teaching and learning can replace the age-graded system. Skill mastery groupings can then become a real possibility and the elusive individualized program can be effected. Team teaching can then become real and teachers talented in different symbol systems can be used more effectively.

One reason why change has been so slow in using what we already know about human growth and development is that certain arguments remain unresolved in the larger society. Watson identifies three: (1) Are certain races genetically inferior? (2) Is poverty due to the improvidence or sloth of the poor? (3)

Are governmental institutions,(especially education) ineffective in producing change in individual circumstances? He categorizes these arguments as biological, social and political and further warns that every citizen must individually and collectively examine his/her values and ideals to move American democracy ahead.[23] If we believe this, we must look at what we do to learners in schools and then ask ourselves why.

David Hawkins argues that human beings are different. He notes that congenital variety among persons modified by early experience is not single track; like biological variety in general, it is many-dimensional, its graph is profile. Whereas a single well-defined curricular track will spread children out in a long line of march, there is also a variance in the learning abilities of a single child along alternative tracks, assuming that these are made commensurable by leading toward a common goal. Thus by a proper assignment of tracks in a way which complements congenital variety, the variance of learning rates can be reduced and with no decrease of any individual rates. Hawkins notes that human beings *qua* human are never indistinguishable, never identical to each other, even in respects important for learning and education. They are incommensurable in their differences.

There is fear of this concept, and rightfully so, because of the arguments mentioned earlier by Watson. Minority groups and the poor see the specters of racial inferiority and discrimination against the poor looming in the practice of such a concept. Implemented by racists, sexists and elitists many problems associated with injustice could be predicted. However, presently the poor and minorities find themselves disproportionately in tracks called special education and career education in desegregated school systems. Hawkins explains that incommensurability excludes marketplace or IQ-dominated notions of unalterable inequality implicit in the "superior student," "ability grouping," and inherited inferiority. For these imply commensurability, the belief that "the more able" excel "the less able" in all possible tracks. In this connection it should be emphasized that incommensurability implies that individuals can be compared and ranked in many sorts of ways. It means that such comparisons are vector rather than scalar in type. It implies that, in general, "one individual does not excel another in all relevant dimensions, does not, in mathematical language dominate him." The postulate of incommensurability takes children as congenitally varied rather than unequal and raises questions about the differential effect of earlier environment in relation to the kinds of learning it has supported or inhibited. It underlines the importance of the local and dependent curricular spiral, tangent at many points to the individual lives of the children, to the educative resources of their total environment which they know or can be helped to discover.[24] Hawkins believes that incommensurability requires a different conceptualization of curriculum. He says diversity of pathways in learning implies the network rather than the little racetrack which is what the Latin word "curriculum" means. He underlines the necessity of constant choice and invention. We must think of curriculum as meaning everything that happens to the child (learner) in the educational institution although he/she learns elswhere.

This includes content (what is taught), methodology (how it is taught) and administration (how we manage and direct all services to achieve the former).

Frank Brown notes that given safeguards, an integrated education is superior to a segregated one, based on the notions that racial isolation is not good for whites and minorities and that policy-makers, who are white, will make more resources available to schools that house their children.[25] Segregated housing as the root cause of segregated schools has not yet been attacked and must be abolished for *de jure* segregation whether of schools or *de facto* segregation whether of housing separates our citizens and creates ghettos. But desegregation will not alone resolve the social inequality in our schools. For even in good schools half the children are below the norm on standardized tests. What happens to them?

We need to review the teaching-learning environment in which the human being experiences the most rapid learning rate of his/her lifetime, the period from birth to five years old. What are the outstanding characteristics of this environment?

First, it is open spaced. The infant generally has the run of the house. We go to great lengths to put poisonous substances and precious objects on high shelves. We try to remove dangerous situations by blocking stairwells and covering holes. We do not put our children in rooms according to age and keep them there for six hours.

It is multimodal. A family may be comprised of several generations, people of different sizes, shapes, ages and personalities. This reality provides models so that imitation occurs more easily. Built-in tutors help the young learner to master skills which are shown him.

Sometimes the family is bilingual and bicultural. Infants have little difficulty learning two languages prior to coming to school. It is individualized. Parents do not expect any two of their children to grow and develop in the same way. Parents expect differences although children sometimes look alike. We need to reconsider what we do to children in schools in comparison.[26]

We are reluctant to change our curriculum because the entire multimillion dollar print and publishing industry is dependent on it for the profits they make from tests, textbooks, newspapers, magazines and periodicals. The standardized test is anchored in the present curriculum. Consequently, if educators would suddenly become interested in true education for human beings compatible with human growth and development all of this would change. The print industry dominated by IBM and Xerox would use millions of dollars to lobby against that change. Additionally, tests are used to reinforce their cultural bias for the purpose of job selection and selection for higher education opportunities. All reverse discrimination cases rest on standardized tests to prove the qualifications of the white males. There is no way that a culturally biased test can reflect the true abilities and gifts of any who differ from those norms.

Our country is more capitalist than it is democratic. This is reflected in our domestic programs as well as in our foreign policy. Just as it is more expedient for us to support a country which is capitalist even though it may have the most brutal dictator known, it is more expedient for us to have a norm-referenced, standardized, monolingual monocultural curriculum which separates all students who differ from white affluent Anglo-Saxon Protestant norms into losers in an economic paradigm which requires winners and losers.

Desegregation does not solve that problem. And, although an integrated society is desirable, we have not yet begun the fight. Until the structure of schools is attacked, the source of much social inequality remains untouched.

Footnotes

1. **Daniels, O.C. Bobby**, "The Bicentennial: Contradictions in American Democracy." *The Black Scholar*, Vol. 7, No. 10, July-August 1976, p. 6.

2. **Davis, King E.**, "Socio-Economic Feasibility of Black Fund Raising." *The Black Scholar*, Vol. 7, No. 6, March 1976, pp. 16-17.

3. **Rawls, John**, *A Theory of Justice*, Cambridge: Belknap Press, Harvard University Press, 1971, p. 55.

4. **Davis**, *op. cit.*

5. **Rawls**, *op. cit.*, pp. 60-61.

6. *Ibid.*, p. 75.

7. **Downs, Anthony**, *An Economic Theory of Democracy*, New York: Alfred Knopf, 1953, p. 174.

8. *Ibid.*, p. 184.

9. **Williams, Louis, Jackson, James A. and White, Shirley**, "Anatomy of Racism," mimeographed, Washington, D.C.: June 1975.

10. **Handlin, Oscar**, "The Goals of Integration," *The Negro American*, ed. Talcott Parsons and Kenneth B. Clar, Boston: Houghton Mifflin Company, 1965, pp. 659-677.

11. **Crain, Robert L., Inger, Morton, McWorter, Gerald A. and Vanecko, James J.**, *The Politics of School Desegregation*, Garden City, N.Y.: Doubleday Anchor Books, 1969, PP. 239-242.

12. **Alsop,Joseph**, "No More Nonsense about Ghetto Education!" *The New Republic*, July 22, 1967, P. 18.

13. **Suttles, Gerald**, *The Social Order of the Slum*, Chicago: University of Chicago gress, 1968, P. 5.

14. **Jencks, Christopher S.**, "The Coleman Report and the Conventional Wisdom," *On Equality of Educational Opportunity*, ed. Frederick Mosteller and Daniel P. Moynihan, New York: Vintage Books, Random House, 1972, p. 69.

15. **Ruth Hayre** in a speech given to the Conference on Black Basic Education, Drexel University, Philadelphia, Pa., November 11, 1976.

16. **St. John, Nancy H.**, *School Desegregation: Outcomes for Children*, New York: John Wiley & Sons, 1975, p. 7.

17. *Ibid.*, PP. 119-120.

18. *Ibid.*

19. **St. John**, op. cit., p. 17.

20. **Bruner, Jerome**, *Toward a Theory of Instruction*, Cambridge: Harvard University Press, Belknap Press, 1966.

21. **Sarason, Seymour B.**, *The Culture of the School and the Problem of Change*, Boston: Allyn & Bacon, 1971, pp. 63-64.

22. **Olson, David R.**, "What Is Worth Knowing?" *School Review*, Vol. 82, No. 1, November 1973, pp. 35-39.

23. **Hawkins, David**, "Human Nature and the Scope of Education," *Philosophical Redirection of Educational Research*, The Seventy-first Yearbook of the National Society for the Study of Education, 1972, pp. 287-326.

24. Ibid.

25. **Brown, Frank**, "Problems and Promises of Urban Public Schools, *The Journal of Negro Education*, *Vol. 44, No. 3, Summmer 1975, p. 249.*

26. **Sizemore, Barbara A.**, "A National Policy for Education," in *Proceedings of Conference on a National Policy for Urban America*, May 22, 1976.

CULTURAL AND ACADEMIC STRESS IMPOSED ON AFRO-AMERICANS: IMPLICATIONS FOR EDUCATIONAL CHANGE

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The author provides a clear discussion of the functional differences between the oral culture and the written culture as they have interacted in the United States. Great stress is placed on the orality of the African culture and its effect upon Africans who have come to America. The author examines the oral culture with regard to music, time and space, among other factors. Thus, this oral tradition provides a clearer understanding of the black experience in America. Another perspective is provided by analyzing black culture through literature, music, poetry and history. Parker clearly shows that blacks have had a society of their own, contrary to the beliefs of certain sociologists and anthropologists. The black cultural concern is discussed in relationship to (1) communal existentialism, (2) uniqueness of the individual, (3) humanistic values, (4) the relationship between good and evil, and (5) black truth. Many readers will find the discussion of the section "Uniqueness of the Individual" somewhat different from other discussions regarding individualism and the concern for uniqueness of the black community. The explanation of the importance which black parents place upon naming their children is clearly presented.

The purpose of this symposium is to make it reasonably clear to its participants the need to consider the importance of deep-seated cultural and hence social differences that characterize Black youngsters in our attempt to educate, counsel, and assess them. For some time now a variety of efforts has been directed toward the amelioration of the apparent problems ostensibly a function of certain social disadvantages suffered by Blacks throughout their experience in America. Headstart, Follow Through, Upward Bound, and a variety of other remedial and compensatory efforts are examples of such ministrations to Black problems. Research efforts of a bewildering variety have been designed and implemented to discover if the apparent poor performance of Blacks as a group on various measures of intellectual and academic ability are a function of inferior genetic ability or inferiority derived from the socially disadvantaged status. The conclusions of these data display the same variety as do their research efforts although of late the "disadvantaged school" has proved the most popular.

Few, if any, of the programmatic efforts based on researchers' findings have resulted in sustained substantial increments in the educational performances of Blacks over an extended period of time. The major shortcomings of attempts to educate and evaluate Black youngsters are the inability or unwillingness (for whatever reason) to come to grips with those deep-seated differences between them and white youngsters that spring from the cultural form and imperatives that are operative in the Black community and in some instances slightly different and in other instances profoundly different from the white American community. The primary substance of this contention asserts that such things as Black culture and the Black experience exist and have historical perspectives that extend to Africa and a contemporary importance that influences the lives of almost all Black people in America. It is further asserted that the influences of Black culture render Blacks profoundly different from whites in very important ways and that such profound differences must be considered in any attempt to educate, counsel, assess or evaluate Black youngsters.

Sociologists contend that the legitimacy of a culture is based on eleven criteria, namely:

1. *History:* All legitimate cultures have a history.
2. *Life Styles:* Is there a life style?
3. *Society within the culture:* What is the importance of "the good" status? What is good? What is bad?
4. *Communications:* Is there a distinct valid communications system within the culture?
5. *Work Occupations:* Is there a relationship between worker and "boss"? Are there rewards for work?
6. *Sexism:* How are the sexes treated within the culture?
7. *Time:* How is the day organized? What does time mean?
8. *Child Rearing Procedures:* What is "proper upbringing"?Who teaches whom? Who teaches what? Academics vs. survival skills.
9. *Recreation:* How do people have a "good time"? What is the joking relationship? Offensive behavior vs. defensive behavior? Does the culture have an art form? music? drama?
10. *Protection:* How does the society within the culture protect its community? women? children? men?
11. *Materalism:* What is valuable? What are worthy materials?

The case of Black culture and the Black experience must begin with those Africans who were transported to the new world as slaves. Contrary to the assertions of E. Franklin Frazier and others, the social and cultural heritage of Africans was *not* destroyed and replaced by a pathological limitation of social and cultural practices.

Historically the basic foundations of the two cultures, white and Black, have always been diverse(see Exhibit I). Europeans or the "western-cultured" are offsprings of a "lettered" culture and Afro-American's roots lie in an oral culture.

The dominant culture of the western world has failed to assess the values and effects of the oral culture (orality). Orality demands different life styles, thought processes, behavioral learning patterns, concepts of time, perceptions, morals, value systems, communications, and assessment procedures. As the European and the Afro-American trekked to an alien land (America), both brought with them specific and different cultural patterns, and in spite of the assumed amalgamation, these patterns have been permitted to nurture separately.

ORALITY

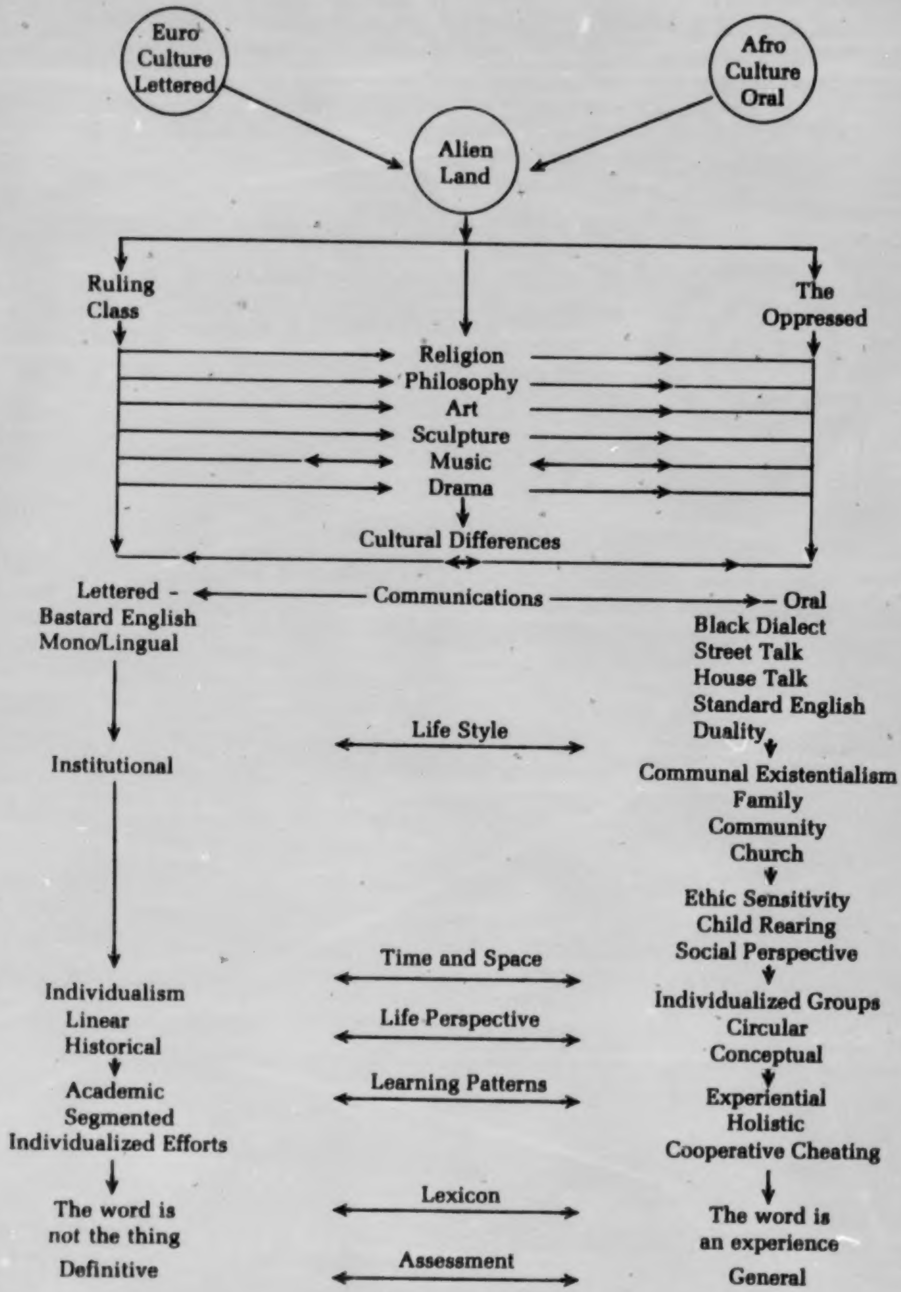
The African cultures from which slaves were taken kept no written records. The fact that Sidran (1971) states that African culture has an oral rather than a literary or "lettered" base makes it possible to suggest a new method for examining the Afro-American experience as a continuum. If Afro-Americans managed to perpetuate their oral culture and extend its base into the greater American society, then we must admit there exists a Black culture with its own social and value structures and a mode of perceptual orientation capable of supporting such structure. Because the lettered culture and the oral culture have alternative views as to what constitutes relevant and practical information, they impose alternative modes of perception for gathering information. Western culture, it seems, stresses the elimination of perceptual information.

Oral cultures use *only* the spoken word and its oral derivatives. The sounds of speech are tied to the time continuum and the hearer must accept them as they come; time is the current of the vocal stream.

To paraphrase McLuhan (1964), the "message is the medium". The oral man thus has a unique approach to the phenomenon of time in general; he is forced to behave in a spontaneous manner, to act and react simultaneously. As a consequence oral man is, at all times, emotionally involved in, as opposed to intellectually detached from, his environment through the acts of communication. This can be called the basic actionality of the oral personality. McLuhan(1964) has characterized this lack of intellectual detachment as contributing to a superior sense of community.

The advantage of the lettered orientation is well known through the advance of modern technology and literature. The advantages of the oral mode become manifest in the ability to carry out improvised acts of a group nature. Sidran

History of Afro-American Culture


Euro Culture Lettered
Afro Culture Oral
Alien Land
Ruling Class
The Oppressed
Religion
Philosophy
Art
Sculpture
Music
Drama
Cultural Differences
Lettered -
Bastard English
Mono/Lingual
Communications
Oral
Black Dialect
Street Talk
House Talk
Standard English
Duality
Institutional
Life Style
Communal Existentialism
Family
Community
Church
Ethic Sensitivity
Child Rearing
Social Perspective
Individualism
Linear
Historical
Time and Space
Individualized Groups
Circular
Conceptual
Life Perspective
Academic
Segmented
Individualized Efforts
Learning Patterns
Experiential
Holistic
Cooperative Cheating
The word is not the thing
Lexicon
The word is an experience
Definitive
Assessment
General

(1971) states that oral man makes decisions and acts upon them, and communicates the results through an intuitive approach to a phenomenon. The lettered man's criteria of what constitutes legitimate behavior, perception, and communications often shut out what constitutes legitimate stimuli to the oral man. Sidran(1971) further states that in language, the African tradition aims at circumlocutions or using as few words as possible to convey a message; in addition to this, tonal significance is thus carried into the communications process (consequently we have what lettered scholars have labeled "Black English" or the Black dialect or "ghettoese").

It is not surprising that the oral culture, being physically involved in communication should rely on rhythmic communication. Rhythm can and does create and resolve physical tension. Tension is very close in feeling to the perception of pleasure; it is at best a positive sensation, at least a release from boredom.

In the oral culture as derived from Afro-American culture there is no distortion between the "artists" and the "audience" (antiphony or call-and-response, which is the basic culture of the Black church).

Another general theory of an oral approach to time can be found in the examination of oral grammar. In Wernings, (1968) research he discovered through the examination of West African grammars that "the African in traditional life is little concerned about the question of time". Time is merely a sequence of events taking place now or in the immediate future. What hasn't taken place or what will probably not occur within a very short time belongs to the category of "non-time". But what will definitely happen or what fits into the rhythm of natural phemomena comes into the category of potential time.

Great cultural changes occurred in western civilization when it was found possible to fix time as something that happens between two fixed points. Time is only a European notion. The rhythm of the human body is human and will always be slightly different from, although related to, the metrical beat of time. Consequently Spegler (1958) may have been more than merely ingenious in identifying the Post-Christian obsession with time as metrically exemplified in European music, with the decline of the West. Time in the western sense is a translation from motion through space. Time in the oral sense is a purer involvement with natural occurrences and perceptual phenomenon (an Afro-American phenomenon called "ethnopsychoconceptualism" is the result of this. Black people do not listen *to* music; they *are* the music, artists do not sing *to* Afro-Americans; they sing *for* them. Blacks do not dance *to* music; they dance *the* music). Thus, the time concept has affected the social situations of the oral culture. Rhythm provides an outlet for black aggression and as such, is "cultural catharsis".

Fannon (1967) has suggested that rhythm is *necessary* in the Black experience. Rhythm is the expression of the Black cultural ego, "inasmuch as it simultaneously assents and preserves the oral ontology or nature of being". Black music is a source of Black social organization; an idea must first be communicated before it can be acted upon. The process of communication is the process of communicating.

Consequently it is predictable that Lawrence Welk, Guy Lombardo, Bach, Mozart, and Brahms will compose, orchestrate, and play music unlike James Brown, Quincy Jones, Ramsey Lewis, Aretha Franklin and Namu Dibango.

The European concept of time is that space is a mathematical division of moments, and therefore, it is not precisely quantified. Time is an ambience of environment in which all men live. Past, present, and future are wrapped up in one. Time is an aesthetic and a metaphysical concept. It is a felt experience. The African concept of time is not linear; it does not exist in a progression of moments. In this transaction time becomes a social, not mathematical, dimension. As one African told me, "time is a time of meaning, not a time of chronology or clock hours. What is important is how you feel at this moment".

The African concept of space is not a mathematical assessment of intervals between points. Space, too, is a felt surrounding experience. Space is not cut up by dividing lines into length, height, or depth. The succession of area or volumes is irrelevant. Space in this sense is one-dimensional (whole). In the African and Afro-American mind space is circular. Space is a circle and the sky is another circle surrounding space. Crossing lines makes for angularity, break-offs, and continuity and completeness.

As shown in Exhibit I, once the two cultures merged, they "reseparated" and constituted a division that has existed for over 400 years. This is not to say that the dominant culture did not have an influence on the Afro-American culture; quite the contrary. Western culture has had a great effect on the Black church (Exhibit I); however, Africanization of the "White" church also took place. Therefore, it is predictable that the Baptist church in the Black community and the Baptist church in the white community will have little in common on any given Sunday morning. "Africanizing" the Baptist church has caused the minister to "preach" differently, the choir sings songs with rhythmic African musical concepts, hand claps are African, and the call and response of the congregation creates an aura that cannot be duplicated in a lettered culture.

Exhibit I demonstrates that Blacks are profoundly different in their concepts of philosophy, art, sculpture, drama, music, communication, lifestyle, time and space, life perspectives, learning patterns, sexism and even assessment.

Ironically music is the *only* cultural phenomenon that has amalgamated to form a new art—jazz. The blues of Africa and the classics of Europe merged to form a "new music to the world". Le Roi Jones (1967) states that without the two cultures merging, jazz could not have become a reality.

The question then is why was music allowed to nurture unchallenged by the majority culture? Ironically the evidence reveals that it was because of the interpretation of what was music?

In the lettered culture music is for listening purposes and entertainment. Music is not psychological. In orality the concept of music is a form of communication; singing and playing music is like talking. Consequently, even slaves were allowed to sing songs, clap hands and make rhythmic sounds. White slavemasters assumed that "singing slaves" depicted "happy slaves". Quite the contrary, singing in the Black community can denote anxiety, happiness, remorse, or dignity. It is a form of communication. Therefore, Blacks have always been allowed to say what they please—*if they sang the words*! Because music was given this "freedom" by the majority culture, "merging" of the music was inevitable. No other art form, phenomenon, concept, ideology, or philosophy has been permitted the same freedom in the two cultures.

THE BLACK EXPERIENCE

Basically, what is presently known about Black culture has come largely from the areas of literature, music, poetry, and history. We do not know, for example, to what extent the literature of Black culture is valid scientifically. We do not know to what extent our past history relates to the ways in which Blacks presently define their culture.

We know that culture is defined as the totality of what is learned by individuals as members of society—that culture is a way of life, a mode of feeling, thinking and acting. Writing in 1871, Tylor said, "culture is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." From this definition, one of the difficulties in analyzing Black culture in America is the notion of sociologists and anthropologists that Blacks do not have, nor have they ever had, a society of their own.[1] That is, one is not born knowing his culture. He must learn it through his parents and various significant others, who filter the way of life of the culture to the child. We must be concerned with the question of the extent to which Black parents and other significant groups teach the Black child a culture that is different from the dominant American culture.

COMMUNAL EXISTENTIALISM

This author maintains that what Black parents tell their children and do with their children is significantly different from what white parents tell their children and do with their children. And, further, that this communication process forms a dominant value, a belief system that in turn makes up the Black culture. One of the basic values in the Black culture is that of communal existentialism.[2] One learns early in life that he must share his physical self with others. The child is born into an environment of on-going social processes. These processes are carried out in an extended family. For example, the child interacts not with "what is yours is yours." It would seem that feelings from the latter statement would lead to individuals who are selfish, who always think of themselves first and their family or group second. For sure, it would not lead to the kind of communal sharing that exists in the Black culture.

This is not to suggest that all Black people have the basic value of sharing their material and nonmaterial possessions with others. But it is felt that Blacks who were raised in working class families, although they may no longer belong to this class, possess the values of communal existentialism. Thus, it becomes nearly impossible for newly arrived Black middle class people to detach themselves from their extended families. Some of the newly arrived middle class Blacks have no desire to cut themselves loose from their families,but see their obligations to help their families who have, more than likely, helped them to get where they are. Thus, middle class Black families are more extended than middle class white families. We can still see the pattern of grandparents and other relatives as part of the family unit. On the other hand, one may find middle class Black families who would like to sever the ties with their past—with their extended families and past friends—but find it difficult to do. Such middle class families may find themselves in reciprocal obligations that they cannot eliminate. Likewise, there are Blacks who were never raised in the pattern of communal existentialism, and consequently, cannot appreciate this pattern in Black culture, nor understand it.

UNIQUENESS OF THE INDIVIDUAL

Another major theme in Black culture is that of a belief in the unique individual and his rights. This may at first seem to contradict the above analysis, but the two themes really fit together. That is, one is free to develop at his own speed, in his own way as long as this development does not hinder another person. Thus, a certain amount of unselfishness is a necessity. However, one need not strive to be like his brothers and sisters. One can be different and yet a part of the family or group.

Early in the socialization process parents try to recognize what is unique in their child. They may arrive at this position by showing the similarities between their child and some relative, but the feeling is not that the child's character or personality will be the same as the person he resembles.

In this small way, they are suggesting that "we have a unique child who is like no other child." Strauss (1968) has suggested that to name is to identify. It is to place a meaning on an object. Names say something about identity. It may suggest the character of the person. Therefore, Black parents make much "to do" over the names they select for their children. They say, in effect, we have just birthed a unique being who may change the course of human events.

The process of naming is a continous one. As Black children grow older, we find that they, in terms of their own identity, may take on new names. It seems that nearly everyone in the Black community has a nickname, and one may grow up in a neighborhood and never know the "real" name of a friend because he was always referred to by his nickname. The nickname says something very specific about the person's character. For example, the nickname may characterize him as: (a) Devil—a person in my youth who would be described by sociologists as an underworld character, but to Blacks in my community, he was a person who knew how to manipulate, deal and get along with nearly all people. He was also a smooth talker and quite handsome; (b) Mungo—a person not particularly handsome, but a strong person who was an outstanding football player; (c) Rabbi—a person who was not necessarily religious but who talked like a minister; again, a person who knew how to deal with others; (d) Pig—the name was initially given because the person ate so much. Although now an adult, he is still referred to by that name, and I find it difficult to call him "James"; (e) Flea—a young man whom I presently know and who insists on being called Flea rather than his given name. He probably got the nickname because he is very small; (f) "Little Sis" or "Big Sis"—in this case my youngest aunt and my mother. These two people are still referred to by the above nicknames. Incidently, the names indicate the birth order in the family—the youngest and oldest daughters, and also certain kinds of rights and responsibilities.

One also finds in the naming process that Black families quite often refer to siblings as "brother" and "sister". These two names are used in place of their given names. I have also found several variations on the names for mother and father. Particularly, I knew one family where the children always called their mother "mother dear". From the short list given above, one may note that nicknames are basically a male pattern rather than being distributed equally among males and females. In fact, I can think of very few nicknames for girls other than Sister, Peaches, Pudding, Baby, Hippy, Streamline, Busty, Legs, Mama, and Fox Sweetie.

Another aspect of equality, as seen through the uniqueness of the individual is the lack of competition within the family. There is little need in the Black family to compete with one's brothers and sisters if each individual is unique. When competition does exist it is not with the thought that "I am better than you", but rather it serves as a method of keeping one prepared for other forces in the environment. To compete for the same girl, for example, simply sharpens one's method of dealing with the next girl. That is, competition serves as a method of developing lines of strategy. Thus, closely related to strategy building is a kind of "ribbing" and signifying that goes on in the Black community. When one person runs another person down, the individual rarely gets angry because it is understood that the whole matter is not serious, but that it is really a tactic or mode of operation. it teaches the individual how to deal with hostile forces. As Joseph White (1970) suggested, Blacks on a regular basis deal with existential psychology without really knowing it. One learns early how to analyze the basic beliefs of others. He learns how to attack these beliefs; and the person being attacked learns how to defend his position. Th ribbing process may center around the existential analysis of what the person is wearing, how he walks, talks or relates to others. Playing the dozen is the epitome of existential analysis in Black culture. To run down the existential basis of another's mother is to be on the brink of physical confrontation or a good hearty joke, depending on the friendship and the situation involved. Whites analyzing Black culture miss the significance of ribbing and playing verbal games. Also, they fail to understand it or appreciate it.

It would seem that in the whole process of signifying, an individual is being prepared for the outside white world. He is learning how to defend himself by any means necessary. Therefore, in this process of strategy building, one is never defeated. He is simply down for the moment and will come up again fighting, sometimes physically and quite often verbally. Thus, it becomes difficult to understand the assertions by educators that Black children lack verbal skills. What I would suggest is that they abound in verbal skills, but they are not the same kinds of skills that the typical teacher is looking for. In fact, if a Black child starts his existential analysis on his teacher, he will more than likely be sent home. He will be defined in a whole host of negative ways. His personhood may be questioned. That is, he may be defined as a hostile, negative, aggressive child.

HUMANISTIC VALUES FOR THE AFFECTIVE EXISTENTIAL BASIS OF BLACK CULTURE

Much as been written about the expressive nature of Black people. Research has ranged from a negative interpretation of this value, Rainwater (1966), to a very sensitive analysis of it as found in the works of Jones (1963, 1967) and Keil (1966). What we find is that Black people have not given up on their humanism—they are a feeling people, who express this feeling in various ways throughout the culture. One must see that the affective existence of Black people is very closely related to their values of shared existence and their emphasis on the unique individual.

Black parents emphasize the right of the child to express himself, to show feelings of love and hate. The two are not separated. That is, one recognizes at an early age that he can both love and hate at the same time. He is taught diunital existence as Dixon and Foster (1971) define the phenomenon. Thus, there is little need to repress feelings of love and hate. Family life is not sedentary; rather, the child is born into an exciting, active environment. Several things may be going on at the same time, and as the child matures, he learns how to tune-in or tune-out on things that do not involve him at any given time.

A specific aspect of the expressive nature of Black culture is seen in the use of language. The way Black people talk—the rhythm of the language, the slangs, the deleting of verbs, are all examples of the expressive use of language. The significance of this is seen in the number of times white sociologists have missed the meaning of words and expression by Black people, the number of times they have not understood the subtle meaning of words. For example, Rainwater (1966), in describing one Black mother's reaction to her child, missed the meaning of the whole conversation. The mother said that her child was bad. Rainwater took this to mean that the mother hated or disliked her child, rather than the fact that the mother was characterizing one aspect of the child—which says nothing about her love or hate for that child.

The expressive aspects of Black culture may also be seen in music, dance, literature, religion, rituals of "root" medicine. Jones' *Blues People* (1963) and Keil's *Urban Blues* (1966) are excellent analyses of the blues as part and parcel of Black culture. The use of dance is seen by many as being basic to the way Black people express themselves. The definition of the word "soul" is quite often defined in relationship to the ability of a person to dance—the rhythm of Black people's dance can be traced directly to its African heritage(Herskovits, 1941). Closely related to the dance is the expressive way that Blacks use their bodies. They walk in a unique maneuver and part of this uniqueness is that each person has his own special walk. He uses his body to give off certain identity stances. Likewise, Black people show greater freedom in touching one another. This touching is not linked with sexual overtones, as sociologists would have us believe, but rather there is no clear-cut distinction between *my* body and *your* body. Thus, in conversation, Blacks stand closer to one another than whites do, they use more gestures, and physical contact is greater. When the rave for sensitivity training started in the early 1960's, the emphasis was on people touching one another and not feeling ashamed about that feeling. I have always maintained that sensitivity training was not for Black folk, since we have always been and continue to be a feeling people who have no hang-ups about touching one another, about dealing with one another in a frank and open manner. All of this relates to the trusting values in the Black culture that grow directly out of the relationship that the young child has with his extended family and friends.

As one moves away from the community of shared Black existence, the situation changes. The more a Black person has internalized the values of white America, the more his beliefs in the values of the Black culture decrease. Therefore, we find middle class Black people who are overly concerned with punctuality, who cannot "understand" why Black people are always late, who cannot appreciate the affective nature of Black people. They may feel that Blacks are too overly familiar with them, do not respect their positions. However, these same Black people who profess a lack of knowledge of Black culture can be seen as still enjoying some of the behavior patterns of that culture. They still have their "soul" parties that may start off quite formal but break down to the natural rhythm of the Black culture as the evening wears on; they still eat "soul" food and listen to the music and dance the dance of Black people. What we fail to do in analyzing the attitudes of the Black middle class is to study their actual behavior patterns. I would maintain that the behavior of the Black middle class around other Black middle class people is quite similar to the behavior of Black people in general and, thus, part and parcel of the same Black culture.

A final aspect of the expressive value theme in Black culture is seen in the use of clothes. The unique outfits of Black people are part of the expression of freedom both as a group and as individuals. The bright clothes in Black culture indicate the attitudes of the people toward life in general. That is, an overall optimism exists in Black culture, although the objective conditions of Blacks have been less than optimistic. What better way for a people to say "we love life," than in the clothes they wear and the way they wear their clothes. Although

Blacks are oppressed by a capitalistic system that keeps them in low-paid jobs, keeps them perpetually unemployed, keeps them in sub-standard housing, and keeps them trapped in an obsolete school system, their outlook is one of hope. And with this hope they continue to struggle for a better existence.

THE DIUNITAL RELATIONSHIP BETWEEN GOOD AND EVIL

The final dominant value or belief to be discussed in Black culture centers around the diunital relationship between good and evil. One is taught early that good will triumph over evil—that one must be fair in dealing with others. The proverb is: do unto others as you would have them do unto you, and likewise, do unto others as you have been done by others. To believe in the triumph of good over evil does not necessarily mean that one must be good all the time. In fact, it becomes necessary to teach the child to protect himself, but never, for example, start a fight. To defend oneself against evil is very appropriate. To not do so would question one's selfhood. Parents teach children not to let anyone take advantage of them. Also, being good does not mean that "goodness" is an absolute concept, for Blacks believe each individual has a varying degree of "goodness" and "evilness". What is analyzed, then, is the overall sense of the total character. A child can be both good and bad at the same time—that is, he is diunital. Consequently, when a parent tells a child that he is bad or evil, it does not mean that this is the final assessment of his character. The statement may only hold true for the moment, the day, or for several years. There is always the possibility that a person may change characters—be converted. Likewise, as stated earlier, to say that a child is bad does not mean that his parents do not love him. They may be simply making what they define as an objective statement. White social scientists have been puzzled by this factor in Black life. They have, therefore, come up with all kinds of hate syndromes in Black people that bear little resemblance to the reality of the situation.

BLACK TRUTH

First of all, in the Black cognitive process it is not claimed that self makes truth. What is claimed is that self is the medium, and the only adequate medium, through which the truth or reality, in its total existential dimensions is wholly and totally perceived and assimilated. Without the intervention of the self in the cognitive act, knowledge falls short of true knowledge, not only in comprehensiveness but also in in-depth intellectual penetration of the life force or life pulse of reality. A purely abstractive insertion of intellect into a subject disqualifies itself by definition from live contact with the living and operating principles in things.

In any event, self in the Black cognitive process is seen as the intellectual mediator and not as the intellectual fabricator of the real in that state of mental existence which we call knowledge. Self is also the complete assimilator and reverberator of truth in the Black cognitive system. In theory at least, self is not presented as a substitute for reality. Nature is the norm. The work of self is to get in tune or in harmony with nature which rules all. Nature then is the controlling reality. And realism is an imperative for African survival and for African thought in every form. This is a first principle.

Principle is one thing, practice is quite another. We must now ask what practical safeguards are there in the Black cognitive process to prevent self from interfering to prejudice truth in thinking. What are the guarantees of objective validity in this method of thinking through feeling?

Basically the Black cognitive process sets up a dual control for objectivity in the use of symbolic imagery.

The collective experience of the group is the sanction for the use of symbolic imagery by the individual. By this I mean that Black symbolic imagery is a participatory imagery.

The second control for objectivity is by appeal not to people but to the facts observed in nature or the environment. It is irrelevant whether these facts were the subject of observation by the thinker himself or the subject of observation by the group over a period of time. Both forms of appeal operate as controls against the interference of self to prejudice truth in thinking.

CONCLUSIONS

As Ballard (1973) states, the history of the Black struggle for education is punctuated by the basic complacency of white educators.

The problems of educating Blacks have changed very little over the years. Some Blacks believe that the mere thought of educating Blacks strikes terror into the hearts of the oppressor. Education remains the primary lever by which the racial situation in this country can be controlled and changed.

If Blacks are to be taught and educated it is imperative that methodology, processes and procedures that are buried in the cultural aspects of one's being be considered. If Blacks cannot be educated and counseled within the vein of their culture, the Black community will retain its 15.9* dropout rate as contrasted with 6.7* for whites.

Curriculum, teaching methods, teacher training, counseling, assessment, and evaluation must be devised to create and perpetuate "educated" Blacks. Unfortunately the process to achieve this goal and the product of that goal are not compatible.

Footnotes

[1]. If one accepts the previous statement, it becomes impossible, then, to speak of culture without a society or a society without a culture. Therefore, it becomes necessary to make a case that Blacks indeed have operated a society within a larger society. That we, at least, have had our own sub-culture within the American society. Al least, the Kerner's (1968) report suggested that America is moving toward two separate cultures— one Black and one white. And historically, John Hope Franklin (1966), maintains that there have always been two separate worlds of race in American society.

[2]. Existentialism here means that one's total being and one's total process of becoming is wrapped up in others. We are who we are because we are an extension of those around us.

Bibliography

Allen, Robert, *Black Awakening in Capitalist America*, New York: Doubleday and Company, Inc., 1969.

Anderson, John Q., "The New Orleans Voodoo Ritual Dance and its Twentieth Century Survivals," *Southern Folklore Quarterly* 24 (June 1960), pp. 135-143.

Ballard, Allen B., *The Education of Black Folks*, New York Harper & Row 1973.

Bateson, Gregory, *Naven*, Stanford, Calif.: Stanford University Press, 1958.

Benedict, Ruth, *Patterns of Culture*, Boston: Houghton Mifflin Company, 1934.

Berdie, R.F.B., "Playing the Dozens," *Journal of Abnormal and Social Psychology* 42 (January 1947), pp. 120-121.

Billingsley, Andrew, *Black Families in White America*. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1968.

Blauner, Robert, "Black Culture: Myth or Reality?" in Peter I. Rose (editor), *Old Memories, New Moods*, New York: Atherton Press, Inc., 1970.

Brewer, John Mason, *American Negro Folklore*, Chicago: Quadrangle, 1968.

Brown, Sterling A., "Negro Folk Expression," *Phylon* 14 (Spring 1953), pp. 50-60.

Childs, Gladwyn, *Umbundu Kinship and Character*, New York: Oxford University Press, 1949.

Cleage, Albert B. Jr, *The Black Messiah*, New York: Sheed and Ward, 1968.

Coles, Robert, *Children of Crisis: A Study of Courage and Fear*, Boston: Little, Brown, 1967.

Cooley, Charles Horton, *Human Nature and the Social Order*, New York: Charles Scribner's Sons, 1902.

Cone, James H., *Black Theology and Black Power*, New York: Seabury, 1969.

Cox, Oliver C., *Caste, Class, and Race*, New York: Modern Reader Paperbacks, 1948.

Cronin, E. D., *Black Moses*, Madison: University of Wisconsin Press, 1957.

Davis, Angela Y., *If They Come in the Morning*, New York: The New American Library, 1971.

Dixon, Vernon J. and Foster, Badi, *Beyond Black or White*, Boston: Little, Brown and Company, 1971.

Dollard, John, *Caste and Class in a Southern Town*, New York: Doubleday Anchor Books, 1937.

Drake, St. Clair and Cayton, Horace, *Black Metropolis*, New York: Harcourt, Brace, 1945.

DuBois, Cora, *The People of Alor*, Minneapolis: University of Minnesota Press, 1944.

DuBois, W. E. B., *The Philadelphia Negro*, Philadelphia: Publishers for the University, 1899.

DuBois, *The Souls of Black Folk*, Chicago: A. C. McClury and Company, 1903.

DuBois, *Dusk and Dawn*, New York: Harcourt, Brace and Company, 1945.

Fannon, Frantz, *The Wretched of the Earth*, Middlesex. Penquin, 1967.

Fasold, Ralph, "Tense and the Form be in Black English." *Language* 45 (December 1969), pp. 763-776.

Franklin, John Hope, "The Two Worlds of Race: A Historical View," in Talcott Parsons and Kenneth B. Clark (editors) *The Negro American*, Boston: Beacon Press, 1966.

Frazier, E. Franklin, *The Negro Family in the United States*, Chicago: University of Chicago Press, 1939.

Frazier, *Black Bourgeoisie*, New York: Collier, 1957.

Herskovits, Melville, *The Myth of the Negro Past*, New York: Harper, 1941.

Hughes, Langston and Arna Bontemps. *The Book of Negro Folklore*, New York: Dodd, Mead,

Hughes, *The Book of Negro Humor*, New York: Dodd, Mead. 1966.

Jackson, George, *Soledad Brother*, New York: Bantom Books, 1970.

Jackson, *Blood in My Eye*, New York: Random House, 1972.

Johnson, Charles S., *Shadow of the Plantation*, Chicago: University of Chicago Press, 1934.

Jones, Le Roi, *Blues People*, New York: William Morrow, 1963.

Jones, *Black Music*, New York: William Morrow, 1967.

Kardiner, Abram, *Psychological Frontiers of Society*, New York: Columbia University Press, 1945.

Keil, Charles, *Urban Blues*, Chicago: University of Chicago Press, 1966.

Ladner, Joyce A., *Tomorrow's Tomorrow*, New York: Doubleday and Company, Inc., 1971.

Locke, Alain, *The Negro and His Music*, Washington: Associates in Negro Folk Education, 1936.

McLuhan, Marshall, *Understanding Media*, New York, Signet 1964.

Mannheim, Karl, *Ideology and Utopia*, New York: Harcourt, Brace and Co., 1936.

Mead, Margaret, *Coming of Age in Samoa*, New York: Mentor Books, New American Library, 1928.

From the South Seas: Studies of Adolescence and Sex in Primitive Societies, New York: William Morrow and Company, Inc., 1939.

Rainwater, Lee, "Crucible of Identity," in Talcott Parsons and Kenneth B. Clark (editors) *The Negro American*, Boston: Beacon Press, 1966.

Read, Margaret, *Children of Their Fathers: Growing up among the Ngoni of Nyasaland*, New Haven, Conn.: Yale University Press, 1960.

Report of the National Advisory Commission Civil Disorders, 1968.

Riesman, David, *The Lonely Crowd*, New Haven, Conn.: Yale University Press, 1950.

Staples, Robert (editor), *The Black Family: Essays and Studies*, Belmont, Calif., Wadsworth Publishing Company, Inc. 1971.

Strauss, Anselm, "Names as Identity," in Bernard Meltzer *Symbolic Interaction: A Book of Readings*, New York.

Sullivan, Harry Stack, *The Interpersonal Theory of Psychiatry*, New York: W. W. Norton and Company, 1953.

Stewart, William, "Socioiinguistic Factors in the History of American Negro Dialect," *Florida Foreign Language Reporter* 5, No. 2 (1967).

Werning, Rainer, "Tribe Time," *International Times*, May, 1968.

White, Joseph, "Toward a Black Psychology," *Ebony Magazine* (October 1970), ;;. 45-52.

Whiting, John and Irwin L. Child, *Child Training and Personality: A Cross Cultural Study*, New Haven, Conn.: Yale University Press, 1953.

Whyte, William Foote, *Street Corner Society*, Chicago: University of Chicago Press, 1943.

TOWARD THE DEVELOPMENT OF MINIMAL SPECIFICATIONS FOR LAU-RELATED LANGUAGE ASSESSMENTS

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The authors provide a comprehensive discussion of the linguistic and cultural concerns related to the landmark Lau v. Nichols *decision in regard to educational opportunities for non-English dominant minority group children. They clearly identify the danger of utilizing the Lau Guidelines which were developed by the Office of Civil Rights because of the tendency for these guidelines to become maximum requirements rather than the minimum requirements which they were intended to be. Gonzáles and Fernández believe that a developmental approach to bilingual education is necessary in today's educational situation. The debate over "maintenance" and "transitional" tends to retard the basic developmental aspects needed for our students. The authors call for the development of school programs to monitor student performance in order to provide for bilingual children achievement levels which are comparable to those of English-dominant children. Phases, which are discussed in depth, include: (1) systematic and valid ascertainment of language charcteristics; (2) systematic ascertainment of achievement characteristics; and (3) matching instructional programs to ascertained characteristics. The authors provide a checklist which will help districts beginning the processes of assessing, classifying and providing for educational programs for non-English dominant minority group children. The authors point out the limitations of the Lau decisions as well as the necessity for school districts to move forward and implement programs which will assist in the "promise" of the Lau mandate. They call for the development of a total education which will meet the full range of educational needs of students with language incompatibility.*

In 1974, the U.S. Supreme Court handed down a decision in the case of *Lau vs. Nichols.* That landmark decision firmly established that if a child is different because of language, and is being excluded from effective participation in public education because of that difference, special educational services to meet his/her language characteristics must be provided by the schools to help ensure equality of educational opportunity. *Inherent in the Lau mandate,* and in its subsequent regulatory interpretation by the Department of HEW, is the need for accurately assessing the English language proficiency of school children in order to design special educational responses and/or to place these children in an educational program which is *at least* linguistically appropriate.

From a purely linguistic perspective, the *Lau* decision should assist in improving educational opportunities for language-minority children. It is unlikely, however, that the full range of educational responses necessary to effect full access, participation and equality will be brought about solely as a result of this one adjudication. Thus, while it is important to fully understand the potential contributions of *Lau* in helping to bring about better education for language minorities and to foster optimum means and the instrumentalities necessary to bring about its intent, it is equally important to note that the more complete set of expectations for total educational reform will probably remain unmet if schools limit their responses to language. Interpreted narrowly, *Lau* requires a temporary linguistic compatibility response in school programs. But that need not be all it accomplishes. It must be emphasized that the remedies outlined by the Office for Civil Rights of DHEW constitute *minimal* responses to identified needs. At the same time, it is obvious how quickly the *minimum* becomes the *maximum* in terms of what school districts will do to meet their obligations under *Lau.*

While we can take heart at the potential impact which *Lau* can have, it is important to remember that schools in the United States reflect the values, priorities, aspirations, biases and ideology of the dominant groups in the society. Said simplistically, in the United States schools do not create a society, rather the converse is true; society creates schools, and these reflect its social, political, cultural and economic orientations. Accordingly, it can only be concluded that in order to change schools, society too must be scrutinized and changed to effect greater participation and a more equitable redistribution of material goods, services, and opportunities for access to upward mobility tracks.

It is within this context that the following recommendations regarding language assessment are made. In short, *Lau vs. Nichols* provides us with a first opportunity to bring about change in one aspect of the education of language minority children. We focus on this opportunity and we offer our suggestions in the realization that much more will have to be done in order to institutionalize the notion of equality of opportunity.

What does the *Lau* decision have to say about the responsibilities of public schools regarding language-minority children?

This decision was based on a mandate issued in 1970 by the Office for Civil Rights of DHEW. The essence of that mandate was as follows:

> **Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.**

It is clear from this statement that the Office for Civil Rights does not acknowledge the potential *benefits*–to the child, to the schools or to society—which may accrue from the fact of children's bilinguality. The government's emphasis is on the child's *deficiency* in the use of the English language. In effect, this language continues to uphold the ethnocentric view that English should be the primary language of instruction in United States schools. Transitional bilingual instruction is suggested by OCR as *one* of the possible program responses which may be used to "rectify the language deficiency" of children. To date, however, neither OCR nor the Supreme Court has mandated the implementation of cultural and linguistic *maintenance* programs which would reflect the pluralism of contemporary United States society. While such programs are not prohibited, it is important to note that neither are they required.

According to the OCR, the development of an educational compliance plan which responds to the requirements of LAU includes four basic phases:

1) student identification
2) student language assessment
3) analysis of achievement data, and
4) the design of appropriate program offerings based on the findings of the first three phases.

In addition, schools should continously monitor student performance to ensure that their achievement levels are comparable to those of their peers. The four phases would involve the following requirements:

a) that schools systematically and validly ascertain which of their clients are linguistically different,

b) that schools systematically and validly ascertain the language characteristics of their clients,

c) that schools systematically ascertain the achievement characteristics of their clients, and

d) that schools match their instructional programs to the characteristics ascertained.

In carrying out the first phase of ascertaining the potential client groups, a simple screening process may be used. The *Lau* remedies state that if a student falls into any one of three categories, the second phase must be followed with these students. A student may be eligible for a *Lau*-type treatment if

1) his/her first acquired language was other than English,
2) the language most often spoken by the student is other than English, or
3) the language most often spoken in the home is not English.

If a student does not fall into one of these three categories, he/she is not considered as a potential target for purposes of *Lau*, *unless* his/her school achievement also suggests an inadequate instructional program.

In the second phase—language assessment—the accurate measurement of language dominance and proficiency is crucial. It is out of this procedure that the student is identified as having the characteristics which would subsequently be matched up with a particular program offering. In some cases the appropriate action would be *placement* in a suitable program; in others, a totally new program or programs must be designed and implemented.

Within the language assessment stage, two separate steps are called for: a determination of *language dominance* and a measurement of *language proficiency*. Both steps are intended to facilitate the diagnosis and prescription of linguistically compatible instructional programs. The first step (after a student has been "screened into" the *Lau* group, seeks to determine the language—or language system—in which the child is most comfortable, i.e., the language in which he/she would be most likely to respond if he/she were completely free to choose. Said another way, dominance is a gross measure of a *preferred* language, language system, or combination of languages or language systems. Thus, a Chicano child who is not English dominant will not necessarily be Spanish dominant. His/her language system (in which he/she is dominant) may in fact be a combination of vernacular Spanish and standard English, or vice versa.

A language dominance measure would theoretically show the language(s) in which a child can receive information most readily. The Office for Civil Rights suggests five categories of language dominance:

A) monolingual in a language other than English,
B) predominant speaker of a language other than English, though he/she knows some English
C) bilingual, i.e., equal facility in English and some other language,
D) predominant speaker of English, though he/she knows some other language.
E) monolingual in English, and speaks no other language.

Clearly, categories A) and E) present no major problems in identifying students. In the other three classifications—B), C) and D)—there are three possible semantic problems: *predominance*, *equal facility* and *language*. Neither OCR nor the Supreme Court has defined these terms clearly enough to establish nationally enforceable standards of measurement. This situation however, poses no major problems for local schools faced with making locally determined evaluations of a *formative* nature. In the absence of legally prescribed definitions—which are not likely to be given in the foreseeable future—it suffices for school communities to reach consensus on the meanings of these terms and to demonstrate that some care and diligence has been given to the *process* of making such decisions.

Measures of *language proficiency* differ from measures of *dominance* in that the former

1) are made *within* a given language rather than between languages,
2) are more strictly *qualitative* than preferential,

3) provide more specific information *vis-a-vis* the matching of instructional program elements with students' language abilities,
4) do not yield data directly relatable to any arbitrary number of classifications but are *individually* prescriptive and diagnostic.

In summary, it may be said that:

1) the screening phase provides the universe of all possible *Lau* client students.
2) the dominance measures group these students into five categories of linguistically similar students and identifies one group (category E) as one which may not require further assessment provided that its members are otherwise being successful in their school work.
3) the proficiency techniques further assess the students in categories A) thru D) and identify their particular linguistic profiles for purposes of program design or placement.

It is clear that varying degrees of sophistication in the science of measurement are called for in the two phases of language assessment. Dominance measures demand greater care in the design of instrumentation and proficiency measures are the most demanding. Many educators have turned to the testing industry for the identification and selection of an appropriate "test" since many such instruments are being developed and merchandised. This is in keeping with current trends in United States education: heavy reliance on standardized (normative) test data. On close scrutiny, however, it appears that this embracement of the "testing syndrome" is problematical in this case since what is needed is regional and even *local* types of data. A feasible alternative is for local school districts to develop or adapt instruments or procedures suited to their own populations and conditions. This paper will suggest certain minimal characteristics or specifications for a sound procedure which can be applied by practitioners in selecting, adapting or creating an instrument, a battery of instruments or a diversified procedure for purposes of *Lau* compliance assessment.

It is the opinion of the authors that a distinction must be made between the procedures and instrumentation for formal research design and those which are to be used for formative evaluation and programmatic decision-making. For purposes of *Lau*, the latter is to be preferred over the former unless, of course, testing is to be used as part of a broader research program. The suggestions which follow are therefore in no way intended to be "scientific" in the experimentally traditional sense of the word. They represent a simple but comprehensive method for conducting a first screening of instrumentation which might subsequently be subjected to more refined and technical tests of quality.

Many factors enter into a determination as to what constitutes the ideal method for assessing the language characteristics of students in a typical school setting. As the checklist illustrates, only some of these are directly related to language, to the mechanics of administration, or to linguistic science. In answering this question for ourselves, we have employed a broad based common sense approach. The resulting analysis can best be described as an *accountability model* in that it seeks to *account* for some of the most relevant factors in selecting an instrument or procedure.

It is suggested that instruments or procedures be subjected to a thorough screening using this or a similar device. Subsequently, a more technical screening (e.g. checks for validity and reliability), might be conducted.

CHECKLIST

Listed below are items which will help you probe the sensitivity and integrity of an instrument or procedure for assessing language proficiency and dominance. It is suggested that the checklist be used by a team or task force rather than an individual. This group should include, where possible, the developers, sellers, or promoters of the particular measure(s) to be analyzed. Other members should include parents, community organizations and persons involved in the design and operation of bilingual education programs.

Any documents which provide a history of the instrument's development should be available for reference. Where time is a problem, you may wish to set a time limit for deciding each item. If a large number of procedures or instruments are to be examined and/or a large number of persons is to be involved in the analysis, you may wish to establish more exact guidelines and divide the tasks or instruments among different groups.

Voting is not recommended. Strive for consensus. This implies the emergence of group reactions which do not have to be wholeheartedly embraced by every member of the group. All members, however, should understand the reason for making such decisions at the time they are made. Remember too that any "cut-off score" must of necessity be an arbitrarily established one even where consensus might exist. Therefore, a rigid "score" should be avoided. The checklist is of the greatest value when seen as a guide for negotiating the complexities of selecting or adapting an instrument. It is not intended as a fail-safe device which guarantees an infallible judgment.

An "Analysis Group" may wish to begin by examining the checklist itself! You may want to (1)add a "comments" column, (2)amend, add to or delete items or (3)construct a master chart which will show the relative merits of all the techniques analyzed.

A. *Pedagogical Specifications*	Yes	No	Not Known	N/A
1. The data yield is reported in a manner which is intelligible and useful to the non-specialist and which makes possible a ready adaptation or development of instructional program components in all of the language arts areas: vocabulary building, reading, sentence construction, phonology, etc.	___	___	___	___

	Yes	No	Not Known	N/A
2. The range and type of language being assessed and the data presentation are directly relatable to school performance and achievement in the language-related curriculum; i.e., criterion -vs- norm references.	___	___	___	___
3. The purpose of the assessment technique(s) is clearly stated and understood by teachers and other personnel involved in its use or in the utilization of data emerging from it.	___	___	___	___
4. Cultural patterns of language usage are recognized and their potential impact weighed in interpreting findings, e.g., child-adult interaction, minority-majority nuances, verbal interactions with strangers, etc.	___	___	___	___
5. S's understand the nature and purpose of the measurement(s) to avoid having them perceive the assessment as being something more than a measure of language, i.e., that their culture is also being "judged."	___	___	___	___
6. A culture-based procedure for determining the S's self-concept has been carried out prior to the language assessment. The distribution of positive/average/negative attitudes about self are of a "normal" type and range.	___	___	___	___
7. Cues (verbal and/or visual) are derived from the S's cultural context and experiences. Stereotypes, esoterica, and incongruities (geographic, cultural or experimental) are avoided.	___	___	___	___
8. Potential differences (among S's) in terms of incentive/motivational styles (in expression, reaction and interaction) are accounted for and a variety of items are incorporated into the assessment techniques to facilitate responses to students with differing styles.	___	___	___	___
9. In addition to the language measure(s) other data on the S's are analyzed to determine possible extraneous factors which may influence language performance; i.e., attendance patterns, achievement records, retention in grade (over-ageness) social interaction patterns, suspected or confirmed emotional problems, and/or physiologically-derived learning disabilities.	___	___	___	___
10. Language measurement techniques may be influenced by negative attitudes towards language and cultural diversity. The possible existence of such attitudes in the school environment has been weighed and safeguards created to minimize their effect.	___	___	___	___

	Yes	No	Not Known	N/A
B. Linguistic Specifications				
1. The measurement techniques were specifically designed for the S's own ethno-linguistic group. Where this is not the case, a careful documentation or record of the adaptation procedures is available for study.	___	___	___	___
2. Both standard and colloquial (regional) language usage is found in the cues used and the responses accepted.	___	___	___	___
3. Where bicultural S's are found to have limited English language abilities, the assumption is not made that they must therefore be fluent in another (standard) language. The possible implications of regional or class language systems (dialectology) are further explored prior to placement in an instructional program.	___	___	___	___
4. An adequate representation of language domains—home language, peer language, media language, formal school language, community language, etc., is included in the cues provided and the acceptable responses.	___	___	___	___
5. All areas of language—phonology, morphology, sintax and lexicon—are included in the assessment. In all of these areas, the S's receptive and expressive language capabilities are measured.	___	___	___	___
6. The assessment instruments and/or techniques cover all phases of language usage: listening, speaking, reading and writing.	___	___	___	___
C. Psychometric Specifications				
1. More than one person (teacher(s), other bilingual professionals, parent(s) etc.) participates in interpreting the findings prior to their widespread use for prescriptive/ diagnostic purposes.	___	___	___	___
4. Borderline cases in a language classification scheme are given special attention. When results are deemed doubtful, students are placed in the lower proficiency category rather than the higher one but provisions are made to reassess them on a regular basis, to preclude permanent tracking.	___	___	___	___

D. Administrative Specifications	Yes	No	Not Known	N/A
1. The techniques are not unduly burdensome in terms of administration requirements (time, staff utilization, etc.) and they are minimally disruptive of S's and teachers' schedules.	___	___	___	___
2. The measurement techniques are conducted in a physical setting which can be reasonably expected not to inhibit language production.	___	___	___	___
3. The measurement techniques, and their day and time of administration take into account the possible influence of the nutritional condition of the S's. Where a nutritional condition might affect results of a measurement, steps are taken to ensure a minimal bias because of such factors.	___	___	___	___
4. The measurement is administered to individual S's rather than groups.	___	___	___	___
5. If the instruments and/or techniques rely on verbal cues, the S's hearing acuity has first been tested and found to be normal.	___	___	___	___
6. If the instruments and/or techniques involve visual cues the S's visual acuity and color and depth perception, etc., have been assessed to guarantee a minimal bias because of vision problems.	___	___	___	___

We should not be surprised if a scrutiny of available language assessment instruments and techniques reveals that a significant number of them fail even to address many of the areas detailed above. Indeed, we are reasonably certain that there does not exist today a test (or a series of tests), which adequately includes the breadth and depth of the categories (pedagogical, linguistic, psychometric, or administrative), outlined in the checklist. Are we asking questions about assessment instruments and techniques with prior knowledge that our analysis will probably yield discouraging results? Is this, then, an exercise in futility? We believe not. It would be overly zealous to suggest that a procedure must satisfy all of these specifications in order to be considered an acceptable measure. But, while no instruments and/or techniques presently exist which might be considered exemplary, we remain unconvinced that these cannot be developed, given time and the resources necessary to complete what will admittedly be a very difficult task. More importantly, however, once these more appropriate instruments and/or techniques are developed, it is likely that more adequate programmatic responses to address the full range of problems identified through their administration will be possible.

We are equally firm in our belief that the enormity of the developmental tasks which lie ahead should not and cannot deter us from pressing ahead with language assessments and subsequent programmatic decisions. We reject the notion that nothing can be done until we are all unequivocally and wholeheartedly satisfied that our assessment procedures are flawless. That would be analogous to suggesting that people should not be married until they have an iron-clad guarantee that they will never have to contemplate divorce. If that were the case, we would either have no marriages or no divorces! Clearly, this would be unrealistic, as unrealistic as the parent who suggests that a child should not go into the water until he/she learns how to swim!

For our purposes, to delay the design of responsive strategies for meeting the needs of students would only put us further and further behind. The present situation can wait no longer. We must plunge into the water and begin to stroke and kick with vigor. As we plunge ahead however, we must be mindful of the many issues, unresolved problems, differences of opinion and other hurdles which are likely to complicate our deliberations and decisions.

There is general agreement that the present status of education measurements leaves much to be desired, as psychologists and other researchers have stated on numerous occasions. The validity of translations of instruments from English designed for and normed against a white, middle class population has been questioned by many investigators. Serious questions have also been raised regarding the use of single-test scores obtained from individual measures of general intellectual abilities, particularly when these scores are used to place students and/or predict success in school. It is clear from the extensive literature on testing in general that considerable research, of a cross-cultural and even intra-cultural nature, is required to detect specific yet subtle cultural and linguistic variables related to perception, cognition and motivation in the educational progress of children. Several intricate questions and many philosophical differences of opinion remain actively unresolved.

A major obstacle too is the inherent fallacy of the belief which, however naive, is espoused by many, that a linguistic approach (teaching of English) based on a deficit model definition ("limited English speaking ability") will open the doors of opportunity on an equal basis for culturally and linguistically different children. Unfortunately, the euphoria of *Lau* and the rhetoric it has generated have led to the creation of a myth that *Lau* represents the ultimate answer to the educational plight of millions of socially, economically, racially, culturally, and linguistically disenfranchised citizens and residents of the United States and its possessions. But if *Lau* is the answer, then what is the question?

In *Lau*, the United States Supreme Court decreed that appropriate remedial measures must be taken to correct existing inequities attributed to language incompatibility. In effect, the decision supported the validity of past OCR directives and regulations (e.g. the OCR memo of May 25, 1970) and recognized the authority of that office to issue and enforce such regulations. Procedurally this is perhaps the greatest contribution of *Lau*. Subsequent findings by other federal courts have further specified what *Lau* does and does not require from a more programmatic perspective.

In some instances, the courts have been reluctant to broaden the scope of the remedies even where they recognize that what may be a linguistically appropriate program may not necessarily be a totally appropriate educational program. Compliance with *Lau* through the remedies outlined by OCR does not ensure an educational program which is comprehensive enough to be fully adequate. Given the philosophical underpinnings of *Lau* and its transitional orientation(and the current status of federal and state legislation regarding bilingual education), it is no wonder that many school systems have opted for purely transitional bilingual education programs to address the educational needs of linguistically-different children.

Whatever resolution is reached to these divergent and sometimes conflicting thrusts, the need for adequate language assessment is in no way obviated. Indeed, we should consider language assessment as a valid practice, an educationally sound mandate which is thus worthy of becoming an integral part of educational planning and evaluation.

Given that the development of optimum instruments and/or techniques is a long range objective, what are educators and evaluators to do in the interim, when only admittedly deficient instruments are available, and these are likely to be used by school systems in complying with the *Lau* mandate. The time element is critical since it is safe to assume that the next five years will witness the true impact of *Lau* on the United States educational scene.

Just what alternatives are there to the present status of language assessment which *Lau* has brought to the forefront through the OCR remedies?

One alternative would be to do away with all forms of testing. Each of us has probably, at some point, wished this to be the case particularly when we read about or personally come in contact with a case of misdiagnosis of educational needs of children due to faulty assessment. But this option must be quickly dismissed as inadequate because it evades addressing the vital need to tailor educational programs to the needs of children.

A second alternative would be to design adequate instruments and/or techniques, taking into consideration the body of knowledge and experience which has accumulated on the subject over the years. Such an approach, we suggest, would require answers to the type of issues raised in this paper and perhaps to others which have not been mentioned. Whether or not there is consensus on the items included in this checklist, without appropriate consideration of the various pedogogical, linguistic, psychometric and administrative issues raised, the result of any efforts to devise satisfactory instruments and/or techniques will be imperfect and will probably serve only to perpetuate existing situations.

The third alternative we offer for your consideration is that minimal conclusions be drawn from the results obtained in the large scale administration of these instruments and/or techniques, which is to say that predictions based on these findings be curtailed as much as possible if they are to be used to prescribe educational programs tailored to the educational needs of children. This is necessitated by the fact that most available instruments and/or techniques presently available are of questionable quality.

Insofar as language proficiency assessment instruments will be utilized to design appropriate programs to meet the total needs of the child, care must be taken that the diagnostic/prescriptive directives which emerge from the results of the assessment not be overly restrictive in terms of the programmatic options which can be made available to children. If language is only one factor, albeit an essential one, of a multi-faceted problem, we must watch out for the "blood test syndrome". Under this logic or method, a sample of language is drawn and examined, and inferences are made about the general health (or lack thereof) of the subject, i.e., success in school due to language proficiency. Given a great number of factors which affect school success, this type of thinking is clearly fallacious. But, even if we could count initially on a sound language assessment, we would still need additional and periodic assessments to maintain an adequate flow of information with which to revise and update programs or reassign students as they progress in their language and academic achievements. If educational programmatic responses must be designed based on existing assessment instruments and/or techniques, then we should make absolutely certain that these responses are flexible enough to allow changes as better, more reliable means of assessment appear on the scene.

In the final analysis, the goal of any educational assessment, including language proficiency assessments, is to help plan a total program which will result in quality education for all students. Language compatibility constitutes an essential component of any successful pedagogical process but educational planning for the whole range of educational needs of students requires that factors transcending language be addressed. It is our hope that this paper has highlighted significant issues which must be dealt with satisfactorily if the ultimate goal of equal educational opportunity is ever to be reached.

IMPACT OF DESEGREGATION: A HISTORICAL AND LEGAL ANALYSIS

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The author provides a comprehensive yet concise review of the historical antecedents of the desegregation movement in America. Harris begins the educational case law portion of his discussion with the Roberts *case in 1849 and traces desegregation impact to recent decisions. The discussion is especially important to those desiring a comprehensive view of desegregation because the analyses are not limited to educational decisions. There is also included a well developed chronology of voting rights, public accommodation and other civil rights concerns. The extensive citations provide an excellent starting point for other researchers who contemplate an in-depth study of individual cases of consequence. The section dealing with contemporary concerns tracing the legal and historical progress of desegregation from 1954 to the present is well worth review.*

INTRODUCTION

"A segregated school cannot be considered the equivalent of a white school because of the inconvenience and the stigma of caste that mandatory attendance of it imposes on the Negro child. Public schools are by definition a place for the benefit of all classes meeting together on equal terms. Segregation injures the child who is white as well as the minority child. . .their hearts, while yet tender with childhood, are necessarily hardened by this conduct, and their subsequent lives, perhaps, bear enduring testimony to this legalized uncharitableness."[1]

The above arguments do not come from any recent court decision. They were stated by attorney Charles Sumner before the Massachusetts Supreme Court over 129 years ago. The impact of that case upon the public was to justify the sentiments of the times—the continuation of segregation in the Boston city schools. Later court decisions have attempted to alter public opinion toward support of a higher ideal of equality of the races before the law. The impact of a court's decision often permeates the very fabric of society itself—far beyond the boundaries established by the facts of the case. The process is continuous and self-perpetuating—altered only by the variables of time and truth.

SOCIO-HISTORICAL SETTING

The American Civil War was fought to both preserve the Union and to free the slaves of the South. Following that war, the onslaught of Radical Reconstruction brought new reforms to the South and three new Amendments to the U.S. Constitution. The Thirteenth Amendment conferred citizenship upon the blacks in the South; the Fourteenth guaranteed them equal protection under the law; and the Fifteenth extended to them their voting rights. Civil Rights Acts were passed by Congress to augment and enforce the Amendments. Legislation and the bayonets of the Union Army were to be the tools to undo the effects which the "peculiar institution" had inflicted on the two races for over 250 years. But the Reconstructionists had failed to foresee the political pressures which society would impose upon the courts; and the withdrawal of federal troops from the South in 1877 marked the return to antebellum attitudes in both North and South. The real question was, perhaps, whether or not attitudes had ever really change at all?

It is not enough to simply pass a law or constitutional amendment to correct a past wrong. In practice, the original intent of the law frequently gets circumvented by other laws and certain legal interpretations by the courts. A court is often asked to interpret legislation according to its understanding of the drafters' original legislative intentions. Yet courts at the same time are expected to attempt to interpret the law in terms of current public opinion and the conditions. The conflict between these two divergent views often results in a compromise which fails to satisfy the original plaintiff, even if he has proven and won his case. Such "hollow verdicts" were common in the history of the desegration movement before 1954.

LEGAL HISTORY AND ITS IMPACT

The earliest attempt to desegregate schools came in the city of Boston in 1849. A five-year-old black child, Sara Roberts was forced to attend Boston's Negro Smith Grammar School; even though in doing so she had to walk past five other elementary schools closer to her home each day. The Smith School was run-down and filled with equipment that, according to an evaluative study and committee report, "has been so shattered and neglected that it cannot be used until it is thoroughly repaired."[2] The father, unable to get his daughter enrolled in any of the nearby white schools, brought suit against the city of Boston.[3] But the eloquence of attorney Charles Sumner was in vain. Chief Justice Lemuel Shaw, while agreeing with Sumner's contention that all persons stand equal before the law, also stated that school segregation existed for the good of both races. People's rights, Shaw added, "depend upon laws adapted to their respective relations and conditions."[4]

In 1857, the case of *Dred Scott v. Sanford* established the status of slaves in the South as property.[5] Up North, the condition of the free Negro was often viewed in the same light by the populace. Blacks were considered inferior among the races of man — fit only to live in inferior conditions and to attend inferior schools. In the 1874 case of *Ward v. Flood*, a California court granted that segregated schools were permissible, but that Negro children might not be excluded from the public schools in the absence of schools set aside for their use.[6] Lip service was thus given to the Fourteenth Amendment of the U.S. Constitution by the court. Its impact was that a separate school system would effectively grow to see that the races stayed segregated.

More circumventing of the newly-won rights of blacks followed. Blacks were denied the right to vote in Kentucky in the 1876 case of *United States v. Reese*[7] because, according to U.S. Chief Justice Morrison Waite, the Fifteenth Amendment did not apply to forcing states to give black citizens the right to vote. The amendment simply stated that a state could not deny its citizens the right to vote because of race or color. The Negro turned away from the polls had to show proof that he was turned away because of his race or color.

This reasoning was no more unusual than its sister case of *U.S. v. Cruikshank*,[8] where two men were indicted for being a part of a 100-man white mob which broke up a political rally for Negroes in Louisiana. The suit claimed Fifteenth Amendment violations. The U.S. Supreme Court, using the reasoning in *Reese*, held that the actions of the mob were not the actions of the state of Louisiana. The Fifteenth Amendment simply prevented a state from denying its citizens the equal protection of the law. It was held not to be the government's business to look into the activities of private citizens. The implications of these rulings to the "private citizens" of both North and South soon resulted in further segregation and denial of that most basic tool of change — the right to vote one's conscience.

State activities against blacks now began to pick up momentum. In 1878, the ruling of the Supreme Court in the case of *Hall v. DeCuir*[9] set aside Louisiana's 1869 act forbidding public carriers to segregate their passengers, on the grounds that it violated Congress's right to regulate interstate commerce. The Supreme Court felt that it would not be in the public interest for Louisiana to pass a law requiring a white passenger boarding the carrier outside of Louisiana to then have to share his car with "colored passengers" once he entered the state.

The concept of separating citizenship of a state from citizenship of the United States is nowhere clearer than in the opinion of Justice Miller in the *Slaughterhouse Cases*[10] of 1879. Technically, the cases involved the supposed violation of the Fourteenth Amendment rights of a thousand butchers through the granting of a monopoly to one corporation in three parishes in the state of Louisiana. The opinion of the Court was that it was "not the purpose of the Fourteenth Amendment. . .to transfer the security and protection of. . . civil rights. . .from the states to the federal government."[11] It was becoming obvious that the states were to be the interpreters of the concept of civil rights. The impact of this was not long in coming.

In Virginia, two Negroes charged with capital crimes were tried and convicted by all-white juries. The two Negroes claimed that discrimination had been practiced against prospective, qualified Negro jurors. They demanded that Negroes be named to their juries. The request was denied. Federal Judge Alexander Rives invoked the 1875 Civil Rights Act and claimed federal jurisdiction. The state of Virginia sued to regain jurisdiction in *Virginia v. Rives*[13] and won. The Supreme Court stated that the obligation to prove discrimination rested with the black defendant. Only after appeal to the state's highest court could federal suit be brought. The process was at best time-consuming and expensive, and virtually ensured that a black man on trial would soon become discouraged. This ruling would completely negate another 1879 ruling in *Strauder v. West Virginia*[14] which struck down a West Virginia law limiting service on juries to white males. The Virginia legislature had placed no such provision in their statutes specifically forbidding black participation on juries. The effect in the South was to virtually ignore the *Strauder* opinion for almost a century.[15] Even the killing and beating of Negro prisoners by an armed mob who had taken them away from a Tennessee sheriff was viewed as a state matter, not a Fourteenth Amendment violation.[16] In court or in jail, civil rights were a "state matter."

The real test of the civil rights legislation came in the famous *Civil Rights Cases*[17] of 1883. More than 100 test cases on the public-accomodations section of the 1875 Act were then in the courts. Segregation, as yet, was not universal—the white community was still free to decide whom they would serve.[18] In its eight-to-one decision, the Supreme Court simply echoed its earlier decisions that the Fourteenth Amendment prohibited discrimination only by the states, not by individuals. The wrongs suffered by blacks were held to be violations of "social rights," not violations of political or civil rights by the states. The effect of the decision was to leave Reconstruction legislation an "empty vessel."[19]

In 1885 the case of *Dawson v. Lee*[20] held that separate tax revenues could not be levied for blacks and whites for the support of separate schools. This did not prohibit Kentucky from establishing a system of inferior segregated schools for blacks out of a common tax fund. Indeed, the argument that the police power of the state must be reasonable and extend only to laws enacted for the promotion of the public good was put forth in the 1886 case of *Yick Wo v. Hopkins.*[21] The Court continually viewed itself as being supportive of both the rights of the state and those of the individual. All was done in the name of the public good. The "public good" was soon to degenerate into the infamous Jim Crow legislation which would so deeply affect the first half of 20th-century American life.

By 1890 the practice of segregation was almost as complete as it had been in the antebellum South. The coffin for civil rights was almost ready for burial, with but two nails remaining to be driven. The first came in 1890 with the case of *Louisville, New Orleans, and Texas Railway v. Mississippi.*[22] Mississippi declared that in 1888 it would be mandatory to establish segregation on its trains within its state borders. Setting aside its earlier decision in *Hall*, the U.S. Supreme Court found this law not to be in violation of any aspect of interstate commerce. Mississippi could indeed sue a railroad for not providing separate facilities for Negroes. What Mississippi did within its own borders was its own business.

The second and final nail came in 1896 when a Negro named Homer Plessy boarded a train on this same railroad and took a seat in a "whites only" car. When he refused to move to a "colored car," he was arrested and taken before Judge John Ferguson who ruled against his argument that the Mississippi law was in violation of the Fourteenth Amendment. The case first went to the Louisiana Supreme Court and then to the U.S. Supreme Court.

The case of *Plessy v. Ferguson*[23] provided a landmark in the history of segregation and the Civil Rights movement, for it marked the zenith and nadir of these concepts respectively. In citing cases all the way back to Roberts, Justice Brown carefully developed his argument that laws permitting the separation of the races do not necessarily imply the inferiority of either race. Brown went on to state that this separation is a valid exercise of the legislative and police powers of the states. Furthermore, Brown argued that in the area of civil and political rights there is not any question as to the equality of the races; but in the social arena, if one race is inferior to the other, then the Constitution of the United States is powerless to put them on an equal standing. In short, as long as racially separate facilities were equal, the concept of segregation was not discrimination. Negroes' claims to suffering were attributed to an overly fragile psychological makeup. That was "the way life was," said the Justices.[24]

The coffin was finished. Next came the gravediggers to forever bury the matter. In 1898 the infamous "grandfather clauses" designed to disenfranchise Negroes came under fire in the case of *Williams v. Mississippi*. The Supreme Court again stated, as they had in Reese, that the act was okay — as long as it did not specifically discriminate between whites and Negroes. Mississippi had learned to write its laws and constitution the "federally acceptable" way. The result was to drop the number of black voters by 123,000 almost overnight.[26]

In *Cummings v. Richmond County Board of Education*,[27] the Richmond County School Board had found it necessary to close the only all-black high school in the county to solve an overcrowding problem among younger black students. The elementary-age youngsters were given the high school building, and the high school-age youngsters were now without a school. Two white high schools existed, but they were closed to blacks. Parents of the black students took the school board to court on the basis of violation of *Plessy*. In brief, they claimed that the board had failed to provide equal facilities for the black youngsters.

The Court held for the school board. Again the Court refused to enter into "state matters." The Court held that schools maintained by state taxation are a state matter and federal intervention cannot be justified unless a clear case of disregard of human rights is shown. The Court felt that no such case had been shown in this matter. Thus did the 19th century end in the field of segregated education as it had begun — separate and unequal in an unbroken line from *Roberts* to *Cummings*.

The *Plessy* case has served as legal precedent for numerous similar cases throughout the first half of the 20th century. In 1902, William Reynolds, a Negro, attempted to enroll his son in an all-white school in Topeka, Kansas. In the case of *Reynolds v. Board of Education of Topeka*,[28] the Supreme Court of the State of Kansas told Reynolds that the board of education was perfectly within its rights to refuse his son entry into an all-white school. Over half a century would pass before another man would attempt to enroll a Negro child in an all-white school in Topeka. The results of this second attempt would forever change the course of race relations in the United States.

Not only had the door been closed on forcing the two races together in public schools, but now attempts were made to compel existing private schools, which were bi-racial by choice, to become segregated. The state of Kentucky passed a law which required that any institution could teach members of both races as long as the instruction took place simultaneously in separate classes at least twenty-five miles apart. Berea College, against whom the law was specifically directed, sued. The Supreme Court of the state of Kentucky found in the case of *Berea v. Kentucky*[29] that the twenty-five mile limit was a bit excessive, but otherwise the aim of the law was good. The case went to the U.S. Supreme Court with the state of Kentucky holding the intermixing of the races to be an "evil amalgamation" and Berea College defending itself as the "promoter of the cause of Christ." Berea claimed the protection of the Constitution.

The U.S. Supreme Court disagreed. In its seven-to-two decision, the Court held the law not to be in violation of the Constitution. There was no violation of the corporate charter granted by the state of Kentucky. Had the college functioned not as a licensed corporation, which was a creature of the state, but as a private group of individuals, the matter might have been different. As it stood, however, the state of Kentucky was upheld.

From time to time small cracks began to develop in the wall of segregation. Little cracks, but cracks nonetheless. The Supreme Court began to change in character. New Justices brought new ideas—new challenges to existing doctrine are often only waiting for the right opportunity to present themselves. In 1917, the first opportunity came. A challenge to Oklahoma's "grandfather clause" permanently enfranchising anyone lineally descended from a voter qualified before 1866 (regardless of their literacy) was made in 1915 on the basis that the clause was in violation of an 1871 act passed to enforce the Fifteenth Amendment. A U.S. District Court ruling in favor of the plaintiff went on appeal to the U.S. Supreme Court.

To the surprise of nearly everyone, the Supreme Court, in *Guinn v. United States*,[30] used the Fifteenth Amendment to strike down the state law. Oklahoma immediately passed a new law giving voting status to anyone voting in 1914 and giving others a once-in-a-lifetime twelve-day period to get registered. The law stood for twenty-two years in open defiance of the *Guinn* ruling.[31] However, it was a start on the road back to equality before the law for blacks in America.

Still, in the matter of private dealings, the court was adamant. In the 1926 case of *Corrigan v. Buckley*[32] the Supreme Court handed down a decision upholding the restrictive housing "covenants" within the District of Columbia. This decision would later be used by the FHA to draft its own "model racially restrictive covenants" to perpetuate Jim Crow housing patterns. The FHA would state that its policies would be to build separate but equal facilities for the races. In practice, the promise was all theory. In 1944 Thurgood Marshall told an NAACP meeting that in Detroit all-white requests for housing had been filled and 800 white units stood vacant. At the same time some 5,000 blacks were inadequately housed and no housing units were available for them.[33]

The year 1927 saw two more challenges to the classification of citizens by race. The first of these was the case of *Gong Lum v. Rice*.[34] The question before the court was one of "color." Were Chinese-Americans in Mississippi "colored" or not? Bolivar County, Mississippi said that little nine-year-old Martha Lum was, and refused her entry into the white schools. Her father sued—not as a challenge to segregated schools, but only to have his daughter classified as "white" and permitted to attend white schools. Again, the right of the state was upheld. The State would decide matters regarding the regulation of its education of the youth at public expense. A little yellow girl was "colored" and, as such, would not be permitted to attend school with white students.

The second 1927 case again challenged voting restrictions on blacks. Dr. A. L. Nixon brought suit against a Texas statute which stated that no Negro was allowed to vote in a Democratic primary election in the state of Texas. The Court, in *Nixon v. Herndon*,[35] held that color might not be used as a basis of statutory classification and struck down the law. The Texas Democrats turned the procedure of setting up voting qualifications over to the state executive committee of the party, rather than the state, and drafted new rules. The Nixon victory was brief.

But Nixon was persistent. With the help of NAACP lawyers, this newest tactic found its way to the U.S. Supreme Court. The decision in *Nixon v. Dondon*[36] stated that the use of an executive committee to regulate election procedures was a form of state action and, as such, unconstitutional. The Democrats then scrapped the committee and called a state convention instead. Nixon's attempt had failed.

The white South soon was to learn that certain rights would have to be afforded to black defendants in court. The famous case of the Scottsboro Boys went all the way to the Supreme Court.[37] The Court, appalled at the haste of the trial, ordered a new trial immediately. The second trial, although it brought out discrepancies in the story of one of the witnesses, still resulted in the conviction of the boys again. Furthermore, the exclusion of Negroes from grand and trial juries was fatally affecting the chances of black defendants. The issue would be raised again in the future—could justice be achieved for blacks at the hands of all-white juries? The answer depended upon a basic change in American attitudes which was still many years in the future.

In 1933 a significant attempt to push an early decision in the anti-Jim Crow fight occurred when Thomas Hocutt filed an application to attend the University of North Carolina's school of pharmacy. Hocutt was rejected by an all-white university and filed suit. The case would turn upon the issue of separate, but equal—either Hocutt could be admitted to the University of North Carolina, or North Carolina would have to provide him and every other qualified candidate their own school of pharmacy. In the case of *Hocutt v. Wilson*[38] the state's attorneys found a way around the issue—they hit upon the entrant's qualifications. Were they good enough? An examination of the plaintiff's high school record was enough. The grades were not that good. The plaintiff had difficulty with some of his words in the witness box. The president of the North Carolina College for Negroes, which Hocutt had attended, refused to cooperate. The case fell through. Too much haste and the wrong choice of plaintiff for this test case was the conclusion of the NAACP. However, one ray of hope came from the court—the duty of the University to admit Negroes to its professional schools would not be ruled upon at this time. The issue might indeed be raised again.

1935 brought two new decisions on the rights of Negroes to sit on juries. In both *Hollins v. Oklahoma*[39] and *Norris v. Alabama*,[40] the decisions of the courts were the same—Negroes on trial in an area could claim denial of due process if other Negroes were habitually prohibited from jury duty in that area. Another crack in the wall of segregation had appeared. It would be quickly sealed, however, in the 1936 case of *Grovey v. Townsend*.[41]

The *Grovey* case brings us back again to Texas and the acts of the Democratic party. Were the actions of the Democratic Party those of the individual or those of the state? In the *Grovey* case, in spite of overwhelming evidence that the state was pulling the strings, the court effectively held that it was a party, not a state, function. The court felt that an attempt had been made to confuse "the privilege of membership in a party with the right to vote for one who is to hold public office."[42] The upshot of this case was to recognize the all-white primary as constitutional.[43] Other states soon followed the lead of Texas. Denied the right to choose the party's candidates, the effect was to disenfranchise the voter effectively at the November polls by giving him only the choices of the white majority.

1936 again saw an attempt to get Negroes admitted to all-white professional schools in the South. After the disaster in *Hocutt*, the group realized that any more Howard University-backed suits would have to be chosen with more care. When Donald Murray asked for admission to the law school of the University of Maryland and was turned down, the black lawyers knew that they had found their case. Murray had been refused admission on the grounds that the Princess Anne Academy, a separate facility, was available to him, along with out-of-state funding if he so desired. Murray filed suit against President Pearson. The official title of the suit was *Murray v. Pearson*, although it became popularly known as *Murray v. Maryland*.[44] The charge was that Murray had been arbitrarily denied admission to the university, although fully qualified. No state law nor university charter barred him from admission to the school. Apparently, the defense finally contended, the reason that Murray was denied admission was on the basis of race—a matter of "public policy." The defendant's attorneys, Houston and Marshall, proceeded to shoot the state's case full of holes by establishing that there was no reason for Murray to be denied admission to the University of Maryland. The presiding judge agreed and issued a *write of mandamus* ordering Murray admitted to the law school. The Appeals Court upheld the decision and the state chose not to appeal any further. Murray quietly attended classes and no incidents occurred.

The impact of the case was considerable. The state of Maryland immediately began to appropriate monies to raise the standard of black education in the state. Neighboring Virginia followed suit. Missouri soon followed with its own out-of-state funding scheme. Black morale was raised in Baltimore and membership in the NAACP rose to 1,500 by the end of 1936.[45]

The Missouri out-of-state funding plan came under attack in 1938 in the case of *Missouri ex rel. Gaines v. Canada.*[46] A Negro citizen sued for admission to the law school of the state university. The trustees, instead, offered him tuition money to study law in another state. The plaintiff sought a *writ of mandamus* to gain entry into the university, but the Missouri courts denied his request. The U.S. Supreme Court reversed the Missouri courts on the grounds that it mattered not what other states offered, but only what opportunities Missouri was denying to its Negro citizens.

The final end to the notorious "grandfather clause" cases in Oklahoma came in 1939 with the case of *Lane v. Wilson.*[47] In the majority six-to-two decision, the Court held that the Oklahoma law was in clear violation of the Fifteenth Amendment. The rights of the Negro, long denied, were slowly being regained; but the fight was far from over as the 1930's came to a close.

An examination of the funding of black and white schools in the 1930's will indicate the disparity that existed between the so-called separate but equal school systems. In Randolph County, Ga., $36.66 was spent annually on each white child and $.43 on each black child. Russell County, Alabama spent $45.74 on each white child and $2.55 on each black child. The values of educational facilities in Upson County, Georgia are equally revealing: For each dollar of declared valuation of black schools, white schools were valued at $2,055.[48]

1940 brought new lawsuits to eliminate segregation and discrimination in pay. The first of these suits was the case of *Alston v. School Board of the City of Norfolk.* Melvin Alston, a black teacher, was being paid an annual salary of $921 while white teachers of the same experience received $1,200. Suit was brought by Alston and a group of black teachers. The teachers were told by the District Court that they had no right to bring such a suit and refused their petition. The case was appealed and reversed. The ruling of the Appeals Court was that the Norfolk teachers were well within their rights to band together and take concerted action — a decision which would make such suits of this type much easier to bring in the future.

After this, the desegregation movement began to move more rapidly. Gains were made in attacking restrictive primary election practices in Louisiana *(U.S. v. Classic*[50]) and in ending the all-white primary in Texas *(Smith v. Allwright*[51]). Jim Crow-restrictions on interstate transportation on buses were lifted in the case of *Morgan v. Virginia*[52] in 1946, and South Carolina was forced to promise to set up a $200,000 law program for blacks in the case of *Wrighten v. Board of Trustees of the University of South Carolina.*[53]

Still, Jim Crow was far from dead. Open defiance was still to be found in Oklahoma in 1948 when Ada Sipuel won her case for admission to the University of Oklahoma Law School.[54] Oklahoma's answer to the U.S. Supreme Court's order was to rope off a section of the campus, assign three teachers for blacks, and call the facility a "separate but equal" school. Tokenism had been born.

The NAACP attacked the restricted covenant issue first raised in *Corrigan* again in 1948 in the cases of *Hurd v. Hodge*[55] and *Shelley v. Kraemer.*[56] The *Shelley* decision helped to break the back of the private convenanters. According to the 1950 census, 459 more residential blocks became open to non-whites in the District of Columbia than there had been in 1940.[57] But still the right of the states to segregate had not been weakened.

1950 saw a host of cases begin the new decade, including the landmark cases of *Sweatt v. Painter*[58] and *McLaurin v. Oklahoma State Regents for Higher Education.*[59] Both cases dealt with the old problem of separate but equal facilities for training Negroes for the professions. The *Sweatt* case challenged the segregation policies in Texas and the *McLaurin* case challenged the one in Oklahoma. Both cases helped to finally open the wall of segregation in higher education and expose the whole scheme for the courts to remedy.

Sweatt had been denied entrance into the University of Texas Law School in 1946 for the simple reason that he was black. In 1946 there were no law schools in Texas for Negroes. Sweatt sued, claiming violation of the equal protection provisions of the Fourteenth Amendment. Texas attempted in 1947 to establish a separate school for blacks with four members of the university faculty and but few of the 10,000 volumes promised for the law library. The school was unaccredited. At the same time, the white law school had 19 professors and 65,000 volumes in its library. Citing the previous decisions in *Shelley* and *Sipuel*, the U.S. Supreme Court ordered the state of Texas to give Sweatt his constitutional rights and admit him to the white law school.

The *McLaurin* case had the same effect in Oklahoma. McLaurin had been admitted to the graduate college to obtain a doctorate in education. The university admitted him, but forced him into restrictive areas of classrooms and even prohibited him the use of a desk in the library reading room. McLaurin brought suit. The U.S. Supreme Court ordered these restrictions dropped. He was to be accorded "the same treatment at the hands of the state as students of other races."

In Delaware, suit was brought in the case of *Parker v. University of Delaware.*[60] In the same year, the "colored colleges" were judged to be so inferior to the white colleges in the state that the Negro plaintiffs were ordered admitted to the white university. Thus did Delaware become the first state-financed college in America to become desegregated at the undergraduate level by court order. Another pair of Delaware cases in 1952, *Belton v. Gebbart and Bulah v. Gebbart,*[61] begun as a simple request to get a school bus for black children, ultimately resulted in a judge ordering a segregated white public school to admit black students. It was the first breakthrough which would lead utimately to the *Brown* decision of 1954.

More gains were made in 1953. In the case of *District of Columbia v. John R. Thompson Co., Inc.*,[62] the Supreme Court voted to uphold an 1873 municipal statute that restaurants which were refusing to serve Negroes were breaking the law. In *Bolling v. Sharpe*[63] a suit was brought to attempt to obtain better schools for blacks in the District of Columbia. In this case segregation itself was attacked. The original decision in the case was that no claim upon which relief could be granted had been made. The case went to the U.S. Supreme Court on appeal. 1954 would find more suits like this one, and the outcome would change the course of the desegregation movement forever.

CONTEMPORARY CONCERN

At the time that Bolling was being reviewed, the U.S. Supreme Court agreed to hear four other cases (*Brown v. Board of Education of Topeka, Briggs v. Elliott, Davis v. County School Board of Prince Edward County*, and *Gebbart v. Belton*) under the title of *Brown v. Board of Education*.[64] Three of the cases had come to the Court on appeal from District Courts in Kansas, South Carolina, and Virginia; and the fourth came on a *writ of certiorari* from the Supreme Court of Delaware. All were challenges to the practice of segregation of the races as practiced by these respective states in the field of education. But these cases, unlike their predecessors, would turn upon considerations of the effects of segregation and not upon purely tangible rights or deprivations.

It was a classic study in oral arguments before the Court; and, after hearing these arguments, a decision was finally reached on May 17, 1954. The separate, but equal, doctrine of *Plessy* was overturned. In the second round of the case, termed *Brown II*,[65] the states were ordered to desegregate "with all deliberate speed." It would seem that the battle finally had been won; but the chief architect of that victory, Thurgood Marshall, knew better. Marshall was asked by another why he wasn't celebrating with the others the night of the first *Brown* victory. Marshall's reply was prophetic: "You fools go ahead and have your fun, but we ain't begun to work yet!"[66]

Southern reaction to the order was predictable. The feelings were probably best summed up in the "Declaration of Constitutional Principles" (known as the "Southern Manifesto") read into the *Congressional Record* by Southern Congressmen. The Supreme Court was accused of substituting naked power for established law, and of planting hatred and suspicion between the races. The Court was even accused of violating its own prior decision.[67] With this attitude, progress on desegration would be expected to proceed slowly at best.

The Supreme Court made it clear to both state governors and legislators that their actions could not defeat the implementation of the desegregation order. The governor of Arkansas had tried to defy the government's integration of the Little Rock School System in 1957 and was answered in his challenge by federal troops and marshals. The handwriting was on the wall.

In *Cooper v. Aaron*[68] the local school board tried to obtain a postponement of the order because of the turmoil and hostilities in the area. The Court would hear none of this argument. Constitutional rights could not be sacrificed to violence and disorder. Arkansas finally agreed to a one-grade-at-a-time desegregation plan for its schools.

It was not until 1963 that any cases on specific implementation plans to meet the desegregation order were decided by the U.S. Supreme Court. Then came the case of *Goss v. Board of Education*.[69] An attempt was made in a "transfer plan" to allow a student to transfer from a school where he would be in a racial minority back to his old school. The Court held that this would result inevitably in resegregation and held the plan to be unconstitutional.

One of the instruments chosen to implement the *Brown* decision was the Civil Rights Act of 1964. The two most significant Titles of the Act were designed to put teeth into the desegregation movement through the control of federal funds for education. Under Title IV, HEW would now monitor desegregation efforts; assistance would be provided to districts attempting to desegregate; and the Attorney General would now serve as the citizens' instrument for bringing lawsuits against districts still practicing discrimination. Title VI stated that discrimination practices would result in withdrawal of federal funds from educational programs. Appealing to the district's pocketbook is often more effective than appealing to their collective consciousness.

Finally, the concept of "all deliberate speed"—viewed as a joke in the South—ran out. Prince Edward County, Virginia, had closed its public schools to deny Negroes the equal protection of the law. Private schools established in their place were being funded by the state. The Court put a stop to this practice.[70] Again, in 1965, an attempt to prevent Negro students from taking courses offered only in a high school limited to whites was defeated.[71]

When the "transfer plan" failed in the South, a new gimmick arose to take its place—the "freedom of choice plan." *In Green v. County School Board of New Kent County*[72] in 1968, the Supreme Court ordered the board to come up with a realistic plan which would work immediately. Should freedom of choice prove to be inferior to any other method of desegregation, then freedom of choice would be unacceptable. In *Alexander v. Holmes County Board of Education*[73] Mississippi's dual school system was ordered to terminate and be replaced by a unitary school system only.

With the orders now out to desegregate immediately, questions appeared as to the legality of the methods chosen. Busing became a central issue. By 1969-70 thirty-nine percent of all public school children were being bused.[74] Busing was judged to be a valid tool of desegregation in the case of *Swann v. Charlotte-Mecklenburg Board of Education*[75] in 1971. The Court added that future construction must not be used as a tool to re-introduce segregation into the school system. Finally, the Court held that no year-to-year adjustments need be made once a school system demonstrates that an affirmative action to desegregate has been accomplished. This landmark case may be thought of as the effective end to *de jure* segregation suits in the South.

In the North, matters have proceeded more slowly. Zoning practices of the school board of Denver, Colorado, were judged to be the basis of the desegregation suit in the 1973 case of *Keyes v. School District No. 1, Denver, Colorado.*[76] The Court emphasized that unless a "separate, identifiable, and unrelated" unit of the school district was segregated because of geographic structure or natural boundaries, and the action was the result of "racially inspired school board actions," then the entire school system had to be desegregated.

Whether to involve the so-called "white suburbs" in a desegregation plan was ruled on in the case of *Milliken v. Bradley.*[77] The Court held that districts surrounding the segregated district would not have to be involved in the plan if those districts were not themselves involved in the discriminatory acts. District lines would have to be respected. Exactly to what extent governmental involvement stops in the process of "racially inspired actions" will be the point upon which the case of *United States v. Board of School Commissioners of the City of Indianapolis* will eventually be decided.[78]

The question of whether there exists a legal duty to correct de facto segregation must, at present, be answered negatively. Certain educational inequalities in terms of tangible deficiencies may be corrected under court order, but not on the grounds of racial equality. The future may hold a more favorable outcome in matters of this sort.

SUMMARY AND FUTURE CONSIDERATIONS

In the area of housing, segregation still persists. Examination of demographic data since 1970 indicates that there exists no evidence of any sharp shifts in the residential isolation of blacks. Even in the suburbs, the trend has been to follow the central-city segregation of blacks. Black "invasions" of neighborhoods and "white flight" from the central cities are distorted concepts characteristic of only about two dozen cities. The eight-to-one majority of whites in the population, coupled with the concentration of the black population in the aforementioned two dozen cities, virtually assures their remaining but a small minority in the other 200 metropolitan districts of this country. Changes in this condition will depend heavily upon reductions in the practice of segregation in the sale of housing in this land.[79]

Considerable desegregation has already taken place in the nation's schools as a result of the actions taken in the 1960's. The sharpest gains, of course, have come in the South. The percentage of black children in all-black schools has declined from forty percent in 1968 to forty-four percent in 1971.[80] Indeed, of all the areas in the country, the South exhibited the lowest degree of racial segregation in 1972.[81]

According to the National Opinion Research Center's results published in *Scientific American,*[82] thirty percent of all Americans favored integration in 1942. The percentage rose to seventy-five percent by 1970. In the South, the trend of the whites in the South favoring integration has risen from two percent in 1942, to fourteen percent in 1956, to almost fifty percent in 1970.

Social class integration has proven of value in raising academic achievement among blacks. The results of the "Coleman Report" pointed out that integration for minority students cannot generally be achieved without racial and ethnic integration.[83] Further studies have shown that there is no loss of white achievement under desegregation plans and their implementation. Yet minority pupils are conversely harmed by segregation—their aspirations are restricted and their confidence is much lower. Segregation tends to instill in blacks fear, dislike, and avoidance of whites.[84] The benefits are obvious—the neglect is criminal.

Still many unfulfilled remedies to desegregation remain to be handled—open housing, minority hiring, minority business, guaranteed annual income, etc., are not being pushed any harder now than they were when they were first proposed. The nation's schools have been left the primary task of the redressing of imbalances among the races—much to the chagrin of sociologists and educators alike.[85]

Major problems still remain. The 1977 reports of the Advisory Committee of the U.S. Commission on Civil Rights has listed fifteen major civil rights issues still unsolved. Among these are: 1) education, 2) employment, 3) women's interests, 4) special groups (blacks, etc.), 5) housing, 6) civil rights enforcement, 7) indigenous groups (American Indians, etc.), 8) prisons, 9) police-community relations, 10) economic issues, 11) voting and political participation, 12) communications, 13) migrants, 14) health and safety, and 15) undocumented aliens.[86] Desegregation now affects many new areas not originally covered in the first civil rights actions. The process has indeed been continuous and self-perpetuating—the impact on the public has had repercussions far beyond what had been expected.

Thomas Pettigrew[87] has taken a look into the future and has looked into the twenty-first century to view the impact of race relations of America. Pettigrew first points out that race relations actually fall into two processes. The phase affecting the young middle class is a positive reflection upon the gains made since 1954. The other process is that affecting the old and the poor—a negative reflection of the country's past failures. Both processes must be viewed together to understand the effect of race relations and minorities on American life styles.

By the year 2000, increasing numbers of blacks and other minorities will join middle class whites in more comfortable lifestyles, while larger numbers will continue to suffer from economic deprivation and racial discrimination. Racial problems will become increasingly more economic problems—welfare will soon outweigh status goals. Busing is seen to be a dead issue by 2000—replaced by new problems of "metropolitanism" and greater income equality demands. Minorities will probably increase their demands for change, while whites will reduce their opposition to change.[88]

How accurate these predictions will be depends upon many factors. All Americans will have to accept a commitment to the future, just as all those who have come before us have had to do. Failure to commit the country to affirmative action could undo all the good work which has taken so long to get underway.

Once the benefits of desegregation are discovered through continued interaction between the races, this commitment will become as natural as its advocates have so long argued that it should be. Perhaps this time they will be heard by a larger and more sympathetic audience. . . .

Footnotes

[1] 5 Cushing Reports 198 (1849).
[2] Richard Kluger, *Simple Justice*, New York, Alfred A. Knopf, 1975, at 75. [3] ***Roberts v. City of Boston*, 59** Mass. 198, 206 (1850).
[4] *Id.*
[5] 19 Howard 393 (1857).
[6] 48 Calif. 36 (1874).
[7] 92 U.S. 214 (1876).
[8] 92 U.S. 485 (1875).
[9] 95 U.S. 485 (1878).
[10] 16 Wallace 36 (1879).
[11] Id.
[12] 100 U.S. 313 (1879).
[13] Kluger, at 64.
[14] 100 U.S. 303 (1879).
[15] Kluger, at 63.
[16] *United States v. Harris*, 106 U.S. 629 (1883).
[17] 109 U.S. 3 (1883).
[18] Kluger, at 65.
[19] Id.
[20] 83 Ky 49 (1885).
[21] 118 U.S. 356 (1886).
[22] 133 U.S. 587 (1890).
[23] 163 U.S. 537 (1896).
[24] Kluger, at 81.
[25] 170 U.S. 213 (1898).
[26] Kluger, at 67.
[27] 175 U.S. 528 (1899).
[28] 66 Kans. 672 (1902).
[29] 211 U.S. 45 (1908).
[30] 238 U.S. 347 (1915).
[31] Kluger, at 104.
[32] 271 U.S. 323 (1926).
[33] Kluger, at 246-7.
[34] 275 U.S. 78 (1927).
[35] 273 U.S. 536 (1927).
[36] 286 U.S. 73 (1932).
[37] *Powell v. Alabama*, 287 U.S. 45 (1932).
[38] No. Car. Superior Ct., County of Durham, Civil Issue Docket No.1-188, March 28, 1933.
[39] 295 U.S. 394 (1935).
[40] 294 U.S. 587 (1935).
[41] 295 U.S. 45 (1936).
[42] *Id.*
[43] Kluger, at 168.
[44] 182 A. 590 (1936).
[45] Kluger, at 195.
[46] 305 U.S. 337 (1938).
[47] 307 U.S. 268 (1939).
[48] "*Fulfilling the Letter and Spirit of the Law.*" Washington, D.C., U.S. Commission of Civil Rights, Aug., 1976, at 2.
[49] 112 F2d 992 (1940), cert. den. 311 U.S. 693 (1940).
[50] 313 U.S. 299 (1941).
[51] 321 U.S. 649 (1944).

[52] 72 F. Supp. 948 (1947).

[53] 328 U.S. 373 (1946).

[54] 332 U.S. 631 (1948).

[55] 334 U.S. 24 (1948).

[56] 334 U.S. 1 (1948).

[57] Kluger, at 255.

[58] 210 SW 2d (1947), 339 U.S. 629 (1950).

[59] 339 U.S. 637 (1950).

[60] 75 A. 2d 225 (Del. 1950).

[61] 347 U.S. 483 (1954).

[62] 346 U.S. 100 (1953).

[63] 347 U.S. 497 (1954).

[64] 98 F. Supp. 797 (1951), 347 U.S. 483 (1954).

[65] 394 U.S. 294 (1955).

[66] Lerone Bennett, "Dat Race Relations Changed Forever," Ebony, 32 (May, 1977), at 141.

[67] *Congressional Record*, 84th Congress, 2nd Session, 1956, at 4515-4516.

[68] 358 U.S. 1 (1958).

[69] 373 U.S. 683 (1963).

[70] *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

[71] *Rogers v. Paul*, 382 U.S. 198 (1965).

[72] 391 U.S. 430 (1968).

[73] 396 U.S. 19 (1969).

[74] E. Edmond Reutter and Robert Hamilton, *The Law of Public Education*, 2nd Ed., Mineola, N.Y., The Foundation Press, 1976, at 625.

[75] 402 U.S. 1 (1971).

[76] 93 S.Ct. 2686 (1973).

[77] 94 S.Ct. 3112 (1974).

[78] 503 F 2d 68 (7 Cir. 1974) cert. den. 421 U.S. 929 (1975).

[79] Karl Taeuber, "Racial Segregation: The Persisting Dilemma," *Annals of AAPSS*, 422 (Nov. 1975, at 87-96.

[80] Thomas Pettigrew, "Educational Implications: A Sociological View of the Post-Milliken Era," in *Milliken v. Bradley: The Implications for Metropolitan Desegregation*, Conference Before the U.S. Commission on Civil Rights, Washington, D.C., (Nov. 9, 1974), at 55.

[81] Id.

[82] Andrew Greeley and Paul Sheatsley, "Attitudes Toward Racial Integration," *Scientific American*, 25 (Dec. 1971), at 13-14.

[83] James S. Coleman, *et al.*, *Equality of Educational Opportunity*, Washington, D.C., U.S. Government Printing Office, 1966.

[84] *Twenty Years After Brown: Equality of Educational Opportunity*, Washington, D.C., U.S. Commission on Civil Rights, (March, 1975), at 73

[85] "Desegregation: How Schools Are Meeting Historic Challenge," *NSPPA*, Arlington, Va., 1973, at 8.

[86] The Unfinished Business: Twenty Years Later. . ., Washington, D.C., U.S. Commission on Civil Rights, (Sept. 1977), at 5.

[87] Thomas Pettigrew, "Exploring the Future: Race Relations in the 21st Century," *Journal of Law and Education*, 4 (Jan. 1975), at 39.

[88] Id.

WARMEST PERSONAL REGARDS

Written by: Anon Y. Mous

School Central
Avenues of the Americas
Our Town, U.S.A.

Mr. Jonathon Doe, Sr.
Walden Pond Drive
Room 222
Our Town, U.S.A.

Dear Mr. Doe:

Under the authority vested in me as Superintendent for Production, I am initiating this correspondence. My purpose is to explain the multidimensional, reciprocal, syncretisic educational implications inherent in the lawsuit which you have filed. Dr. A. C. Buckpasser, the General Superintendent, has assigned School Central's legal counsel, Mr. Anguish N. Chagrin, the mission of addressing any legal implication. You will be hearing from him shortly.

Essentially, you claim that your son, John, Jr., could not read or write at the sixth grade level after having completed thirteen years under the tutelage of School Central. Your contention being that this ignorance constitutes negligence, misrepresentation, breach of statutory duties, and constitutional deprivation of the right to an education on the part of School Central; thus, establishing his eligibility for punitive and comprehensive damages in excess of one million dollars.

Regardless of the fact that School Central does not have an established policy (although a comprehensive and equitable Damaged Goods Policy is now being drafted), your position is totally without credence. Your arbitrary posture, especially after School Central was gracious enough to certify sufficient attendance to qualify him for graduation, has shocked our Establishment. It is obvious that you are trying to use the judicial process to hold School Central legally accountable for the end result of the educational process. Sadly, you cannot imagine the inherent danger if the legal status of education were actually changed from a privilege to a right.

You must always remember that School Central graduates whatever comes off the production line. Your demand that School Central ensure that a student attain an acceptable performance level violates acceptable cost constraints. Due to the advancement of computer technology there is now sufficient data available for School Central to be confident (to the .05 confidence level) that its graduates have been exposed to a few major educational thoughts and practices, which is all that can reasonably be expected. Goodness gracious, what do you want! I'll bet that you have problems in your organization, too.

Incidently, you have certainly irritated our Central staff with your salacious statements about retention and promotion practices. After all, your child graduated only one year behind his class. Altogether, that's not too bad. It's much better than the majority of our graduates have done.

You should be happy to learn that one responsible act will result from your traitorous action. At the next Board of Directors meeting Dr. Buckpasser will propose that all future enrolees be required to possess an I.Q. of over one hundred. School Central will then have a fighting chance to score above the 50th percentile on standardized tests.

A comprehensive computer analysis by School Central, International (and there is no higher power) definitely establishes that you have two other issues still under the domination of School Central. The granting of these students' Prescribed Preparation for Post-Puberty Performance, PPP-PP (the PPP-PP is still, sometimes, inaccurately referred to as a Diploma) is threatened by your legal action. To forestall this, School Central suggests that you withdraw your lawsuit immediately.

Please be advised that a motion is now being considered which will result in the elimination of both your issues from the educational environment. Only prompt capitulation can forestall this action. Non-adherence to this request will cause the permanent record cartridge of both your children to self-destruct. This ultimate and final action effectuates total educational nonexistence: All future educational opportunities being obviated as well as nullification of any previously issued PPP-PP's—to include your own! School Central has its own Enforcement Division dedicated to the confiscation of erroneously issued PPP-PP's.

In summary, School Central believes that it is the responsibility of the home and the school to work together (so, please refrain from pulling the "irate parent" bit and do your share).

WARMEST PERSONAL REGARDS

Ima Paperpusher
Superintendent for Production

P.S. You missed the point when you claimed that at graduation your child did not resemble the "innocent" that was entrusted to School Central. His pot-smoking, lackadaisical nature, ill manners, vile language, pillpopping and general stupidity cannot be attributed to School Central. Besides, these difficulties are minor and relatively insignificant.

P.P.S. Those who "cross" School Central live to regret it.

NEW DIRECTIONS IN DESEGREGATION LITIGATION

Martha M. McCarthy
Indiana University

The author traces the recent activity in desegregation litigation. The primary focus is on the controversy which surrounds de jure and de facto segregation. Also discussed is the double standard as well as the determination of the unlawful state intent. McCarthy clearly points out that recent judicial rulings have confused rather than clarified the scope of the remedies presently available to effectuate the desegregation of American schools. A comprehensive analysis of recent desegregation cases is tied to an explanation of the Supreme Court's recent rulings in its civil rights decisions. The author speculates that the courts are becoming more hesitant to uncover constitutional violations and to order massive student a reassignment plans as a remediation measure. It is pointed out that desegregation cases may be a part of a larger judicial phenomenon indicative of an attitude of retrenchment away from the activism of the Warren Court. The author feels that this decade may witness the emergence of a new definition of discrimination.

Legally-sanctioned school segregation is unlawful under the Constitution of the United States; this fact is indisputable. When evidence of such de jure segregation is produced, state officials are obligated to take affirmative steps to remedy the situation. In short, federal courts have broad discretionary powers to effect relief when blatant racial discrimination in public schools can be traced directly to state action. So far, the scenario is simple, but it is deceptively simple. The complications start to multiply in geometric proportions as one analyzes recent developments in the school desegregation arena. The continuing controversies over the de jure/de facto double standard and the scope of federal courts' powers to order interdistrict remedies seem to hinge on whether a finding of unlawful state intent is present. The focus of this paper, therefore, is on the evolution of the Supreme Court's interpretation of the factors necessary to establish unconstitutional state intent in school desegregation litigation.

DE JURE VERSUS DE FACTO SEGREGATION: A DUBIOUS DISTINCTION

Traditionally, the term de jure segregation has been used to connote segregation by law. The notion of de jure segregation also has been extended to cover those situations where overt acts of school officials, such as school district gerrymandering, have obviously encouraged school segregation. De facto segregation, conversely, has been defined as segregation which exists in fact but is not the result of intentional discriminatory action on the part of government officials.

Until 1970 courts did not deal extensively with de facto segregation and usually rejected de facto concerns as beyond the scope of the original *Brown* decision.[1] Courts held that while public school students have a constitutional right to avoid being the objects of discrimination, they do not have a constitutional right to attend or refrain from attending any particular school on the basis of racial considerations unless there has been overt discrimination against them. For example, in both *Bell v. School City of Gary, Indiana* and *Deal v. Cincinnati Board of Education* the federal courts reiterated that de facto segregation was not unconstitutional as long as it resulted from racially isolated residential patterns and involved no deliberate attempts to impede integration.[2]

There has not been unanimity, however, among justices when they have decided public school desegregation cases in areas other than the South. In contrast to the *Bell* and *Deal* decisions, during the early 1970's several lower courts started to blur the distinction between de jure and de facto segregation. In *Hobson v. Hansen*, the federal district court in Washington, D.C. extended a school district's affirmative duty to achieve integration to include situations of de facto segregation resulting from "unintentional" administrative practices.[3] In the court's view, racially homogeneous schools damage the minds and spirits of all children who attend them regardless of whether the segregation exists by law or due to natural conditions. Similarly, in 1970 a federal district court in California held that school authorities have a duty to remedy segregation resulting from the exercise of powers in a manner which creates, continues, or increases substantial racial imbalance in schools "regardless of the motivation" of school officials.[4] Also, in 1972 a federal district court in Minneapolis held that the Constitution applies equally to all public school systems, regardless of whether segregation is imposed by statute or covertly.[5] Thus, several lower courts have evaluated the operative effect of school policies and practices rather than whether or not racial hostility was present, and a large number of jurisdictions have ruled that de facto segregation must be remedied.[6]

Civil rights groups have challenged the contention that where segregation is de facto, no duty to correct is required. They have questioned whether the origins of "natural" racial isolation in non-southern states were as "innocent" as has been previously assumed.[7] Proponents of erasing the de jure/de facto distinction have claimed that affirmative state action can be found in almost any situation where segregated schools exist. Support for this argument is provided by the fact that states regulate very specific aspects of schools from curriculum offerings to teacher certification. In addition, the ultimate responsibility for designing and redesigning school districts rests at the state level. Thus, it is asserted that *any* existing school segregation can be attributed to state action and must be remedied by state officials. Furthermore, prior to the late 1940's, housing patterns were controlled in most sections of the country through the device of restrictive covenants which were sanctioned by the government; such covenants caused the emergence of racially and economically homogeneous neighborhoods and schools. Consequently, it is argued that segregated schools resulting from such circumstances should be considered as de jure in nature as those schools formerly segregated by law.[8] This type of segregation is particularly significant in large metropolitan areas where there is a high percentage of black students who are mainly concentrated in well-defined residential sections of the central city, while most of the white students live in virtually all-white suburban areas.

Some legal commentators argue that the presumed differences between de facto segregation and de jure segregation have no factual basis.[9] Those favoring the abolition of the distinction between de facto and de jure segregation insist that a national standard in school desegregation remedies should be enforced.[10] Without national criteria that are uniformly applied, it is alleged that the legal requirements involving desegregation represent an unfair double standard between the northern and southern states.

Although the Supreme Court initially was hesitant to enter the de jure/de facto controversy, finally in 1973 it delivered an opinion regarding segregated schools outside the South. This decision, *Keyes v. School District Number 1*, involved alleged discrimination in the Denver public schools.[11] In a seven-to-one decision, the Supreme Court held that where a policy of intentional segregation has been established with respect to a significant portion of a school system, the burden is on the school authorities to prove that their actions as to other segregated schools in the system were not also motivated by a segregative intent. The court held that operational de jure segregation *could* be found in states other than the seventeen that maintained dual school districts by law in 1954 and that the differentiating factor between de jure segregation and so-called de facto segregation. . . "is purpose or intent to segregate."[12] Thus, in *Keyes*, the Supreme Court ruled that "intentional" segregation, whether or not imposed by statute, is unconstitutional.

Justice Powell, in a separate opinion in *Keyes*, urged the Court to abandon the distinction between de jure and de facto desegregation in its decisions.[13] He stated that segregation in schools outside the South was fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half. He also stated that the evil of operating separate schools was no less in Denver than it was in southern cities. Furthermore, he asserted that "public school authorities are the responsible agency of the State," and therefore, "if the affirmative-duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver."[14]

In contrast to Justice Powell's viewpoint, Justice Rehnquist argued in his dissenting opinion that situations of de facto segregation should be treated differently than legally sanctioned segregation: "In the absence of a statute requiring segregation there must necessarily be the sort of factual inquiry which was unnecessary in those jurisdictions where racial mixing in the schools was forbidden by law.[15] He further admonished the Court majority for sanctioning broad discretionary powers for federal judges to uncover unlawful school segregation:

> Underlying the Court's entire opinion is its apparent thesis that a district judge is at least permitted to find that if a single attendance zone between two individual schools in the large metropolitan district is found by him to have been 'gerrymandered,' the school district is guilty of operating a 'dual' school system, and is apparently a candidate for what is in practice a federal receivership.[16]

Despite the lack of agreement as to whether the Court majority went too far or not far enough in eliminating the de jure/de facto double standard, the *Keyes* opinion did establish that the essential ingredient of unlawful de jure segregation outside the South is a finding of "segregatory intent." However, the meaning of "segregatory intent" was left judicially unclear. Such ambiguity in Supreme Court guidance has nurtured diversity in lower court interpretations of the constitutional mandates. Some courts have sought specific proof of intent while others have viewed intent as inferrable from actions where the predictable consequences are segregatory.[17]

Many egalitarians anxiously awaited the Supreme Court decision regarding segregation in the Detroit public schools in hopes that the ruling would offer the much needed clarification vis-a-vis the legality of de facto segregation. In this case, *Milliken v. Bradley*, the Supreme Court overruled both the federal district court and the Sixth Circuit Court of Appeals that had required multidistrict desegregation involving Detroit and the surrounding suburban districts.[18] Under the district court's order, desegregation would have been effected by a metropolitan plan embracing Detroit and fifty-three outlying districts. In reversing the lower courts, the Supreme Court held that a multidistrict, area-wide remedy for single-district de jure school segregation violations may not be imposed where there is no finding that the other school districts failed to operate unitary school systems or committed acts that enhanced segregation within the de jure district. Furthermore, the Court majority concluded that the district boundary lines had been established with no intent to foster racial segregation. The majority emphasized that school district lines may not be casually ignored because the concept of local control of public education is a deeply rooted tradition in this country.

Justice Douglas, in his dissenting opinion, took issue with the majority position and argued: "If this were a sewage problem or a water problem, or an energy problem, there can be no doubt that Michigan would stay well within federal constitutional bounds if it sought a metropolitan remedy."[19] Although the Detroit decision is used to support the contention that cross-district remedies should not be employed in desegregation cases, the Supreme Court actually did not state that interdistrict remedies never would be appropriate. Instead, the Court cautioned lower courts to be sure that the scope of their remedial decree equates the constitutional violation uncovered.

Even though the Supreme Court reluctantly entered the de jure/de facto controversy, it has delivered several recent proclamations in cases involving Pasadena, Austin, Indianapolis, and Dayton which appear to be broadening the de jure/de facto gulf and narrowing the grounds for finding unconstitutional school segregation.[20] The touchstone in these cases has been an assessment of the racial neutrality of governmental motives. Consequently, the Court has concluded that some segregated school districts themselves have not intended to to create the segregated conditions.

A NEW THEORY OF DISCRIMINATION: IMPACT VERSUS MOTIVE

It is evident that the Supreme Court is hesitant to expand its interpretation of constitutional guarantees and to sanction broad remedial tools for the elimination of school segregation. Although civil rights activists have turned to federal statutory provisions in hopes of gaining greater relief than is currently possible when challenges are based solely on federal constitutional guarantees, there is meager evidence that this approach will provide acceptable solutions. Recently, the Supreme Court has interpreted civil rights statutes as narrowly as possible, thereby limiting rather than expanding the protections afforded to citizens under these acts.[21] Furthermore, little deference is being given to federal agency regulations in deciding cases.[22]

The Supreme Court's posture in desegregation litigation cannot be divorced from its stance in addressing all types of discrimination. It may be that within six years a theory of discrimination was created and destroyed. In 1971 the Supreme Court articulated the "disparate impact" principle for evaluating the legality of policies under Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment on the basis of race, creed, national origin or sex. In *Griggs v. Duke Power Company*, a case involving racial discrimination, the Court declared that proof of intent was not necessary to establish unlawful discrimination.[23] Thus, practices with a disparate impact on a protected class had to be accompanied by evidence that they were necessary to job performance in order to withstand judicial scrutiny under Title VII.

The "disparate impact" theory, although grounded in Title VII, began to influence constitutional litigation as well. However, this development came to a halt in 1976 with the Supreme Court's decision in *Washington v. Davis.*[25] In this case plaintiffs were black applicants for admission to the police training program of the District of Columbia who were rejected because of their low scores on a verbal skills test (Test 21) given to all applicants. The trial record showed that four times as many blacks as whites were eliminated by the test. Hence, the appeals court concluded the plaintiffs' due process rights had been impaired because police officials failed to conform to the Title VII standard set out in

Griggs. In essence, the appellate court found that because the verbal skills test had a disproportionate impact on blacks and was not substantially related to job performance, the plaintiffs' constitutional rights had been abridged. However, the Supreme Court reversed the holding of the Court of Appeals. Justice White, writing for the Supreme Court majority, declared that the appellate court erred when it equated Title VII standards and constitutional standards. While recognizing the *Griggs* principle, the Court majority in *Davis* emphatically stated that evidence of a disparate impact alone will not evoke constitutional guarantees. Aggrieved individuals must also show that the challenged policy is an intentional device to disadvantage a protected class. Consequently, a disproportionate impact must be accompanied by unlawful motive in order to abridge the United States Constitution.

The Court majority found that the verbal skills test in *Washington v. Davis* was used for a permissible purpose—to improve police effectiveness—and without discriminatory intent. The majority concluded that the Federal Constitution and the Civil Service Act (5 U.S.C. s 3304) permitted the use of a test that predicts performance in a job training program rather than performance in the job itself. Approving the district court's holding on that point, the Court declared:

> Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. . .This conclusion seems to us the much more sensible construction of the job-relatedness requirement.[26]

While Justice Stevens concurred with the majority opinion, he stressed that racial impact may often be sufficient proof of discriminatory intent and that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[27]

The dissenters in *Washington v. David*, Justices Brennan and Marshall, rejected the majority's definition of "job-relatedness" in testing.[28] They asserted that the regulations of both the Civil Service Commission and the Equal Employment Opportunity Commission, as well as the Court's decision in *Griggs*, require that an employment test be related to actual job performance. Brennan and Marshall were unwilling even to concede that the test in question measured success in the training program.

Several desegregation orders have followed the logic outlined in *Washington v. Davis*. In a six-to-two decision involving Pasadena, California, the Supreme Court majority ruled that the district court was not entitled to require the school district to rearrange its attendance zones each year to ensure that the desired racial mix was maintained in perpetuity, as long as the initial implementation of a desegregation plan had accomplished its objective.[29] Justice Rehnquist, delivering the majority opinion, stated that having once achieved a racially-neutral attendance pattern, the district court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

In a subsequent case involving Austin, Texas, the main issue was the constitutionality of the city's neighborhood school policy.[30] The Fifth Circuit Court of Appeals had found that the implementation of a neighborhood school plan in Austin created intentional school segregation due to the existing residential segregation. To remedy this intentional discrimination, the appellate court ordered a massive busing plan involving approximately forty percent of Austin's 60,000 students. The United States Supreme Court, however, vacated the court of appeals decision and remanded the case for reconsideration in light of *Washington v. Davis*. Accompanying the one sentence order was a four-page concurring opinion written by Justice Powell in which he admonished the court of appeals for ordering a busing plan more extensive than necessary to correct any constitutional violation committed by the school board. Furthermore, Powell contended that the plan required annual readjustments in student assignment zones to counteract the effects of changing residential patterns, which was in direct conflict with the Supreme Court's proclamation in the *Pasadena* case.[31]

One month after the Austin desegregation decision, the Supreme Court delivered an opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corporation.*[32] In this case, a racial discrimination suit was filed because Arlington Heights refused to rezone to allow a moderate and low income housing project to be built within its boundaries. The Seventh Circuit Court of Appeals held that the ultimate effect of the refusal to rezone was racially discriminatory; hence, the Village Planning Commission's actions violated the equal protection clause. However, the Supreme Court reversed the decision. Justice Powell, writing for the majority, articulated that plaintiffs did not bear the burden of proving that race was a motivating factor in the planning commission's decision.

Two weeks after *Arlington Heights* was handed down, the Supreme Court issued an unsigned, one-sentence order in which it vacated the ruling of the Seventh Circuit Court of Appeals regarding desegregation of the Indianapolis public schools.[33] In July, 1976 the appellate court had ordered that 6,500 black students be bused from the inner city to schools in surrounding predominantly white suburbs. The cross-district busing plan was based on the finding that the state had contributed to racial segregation by leaving school district lines intact when it created a metropolitan government for all municipalities, including Indianapolis, with Marion County. However, the Supreme Court ordered the lower courts to reconsider the Indianapolis case in light of the decisions in *Davis* and *Arlington Heights*. Thus, the lengthy litigation involving desegregation in Indianapolis remains unsettled.

In a school desegregation case involving Dayton, the Supreme Court seemed to follow the *Davis* doctrine in limiting its finding of unconstitutional segregative practices.[34] The Court found a disparity between evidence of constitutional violations in Dayton and the "sweeping remedy" imposed by the courts and thus remanded the case for further review. Subsequently, the federal district court endorsed school board action to dismantle the desegregation plan. Although additional appeals are in progress, it seems doubtful that a large scale busing program will be carried out in Dayton.[35] Wilmington, Delaware also recently received another reprieve from implementing a massive student reassignment plan to achieve desegregated schools. Following the Supreme Court's direction, the federal district court in Delaware ruled that it was educationally unsound and adminstratively undesirable to begin desegregation until the fall of 1978 in Wilmington. As a result, the suit initiated in 1971 is still under investigation while schools in Wilmington remain segregated.[36]

In cases following the *Washington v. Davis* guideline, the Supreme Court has reiterated that an official action will not be ruled unconstitutional solely because it results in a racially disproportionate impact. Although recognizing that the resulting discriminatory effect is not irrelevant, the Supreme Court has emphasized that unlawful motive is the necessary trigger to abridge constitutional guarantees. Thus, the crux of the northern desegregation dilemma hinges on the distinction between motive and impact, and in recent cases plaintiffs have been forced to carry a heavier burden of proof in establishing that unlawful motives exist. The Supreme Court had indicated that 'benign neglect' alone does not abridge constitutional guarantees. Some overt, *intentional* act to disadvantage protected groups must be present in order to evoke a federal remedy. This demonstration of direct unlawful intent poses a formidable obstacle for those seeking relief against alleged discrimination. If the Supreme Court continues to declare that intent cannot be inferred from observable actions, then desegregation remedies may not be required in many situations currently being contested.[37]

Indeed, *Washington v. Davis* may mark an important shift in the interpretation of the United States Constitution. In the year since *Griggs v. Duke Power Company*, policies which appeared "neutral" on their face, yet had a disparate racial impact, were viewed with suspicion by the courts. Defendants were faced with the burden of proving that their acts or policies were compelling. In Griggs, the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 implied that intent was not relevant if an act or policy proved to be discriminatory in effect. However, cases using the analytical approach to discrimination outlined in *Washington v. Davis* appear to be eroding the protections articulated in *Griggs*.

Even though the Supreme Court continues to affirm its allegiance to Griggs for statutory review, its recent decision in *General Electric Company v. Gilbert*, a case involving alleged sex discrimination in employment, indicates that the constitutional principle is influencing judicial analysis of alleged discriminatory practices under Title VII.[38] The challenge in *Gilbert* was based on Title VII grounds, but nonetheless the Court relied heavily on the constitutional arguments in upholding a disability benefits policy with a disproportionate effect on women. The mere fact that the policy had a dramatically different impact on the two sexes did not convince the Supreme Court that a Title VII violation was involved.

This recent judicial posture is ripe with implications for future litigation, not only involving school desegregation, but also regarding the entire spectrum of civil rights. It can be extrapolated that state officials have no duty to remedy situations where practices have a disparate impact on vulnerable minorities or to give preferential treatment to any group due to past disadvantages. The Supreme Court seems alarmingly close to ruling that the state can stand by and watch discrimination take place as long as government officials do not encourage the discriminatory practices. In short, policies which impact differently on various groups will be sanctioned as long as motives are deemed to be pure.

Therefore, it appears that the Supreme Court has traveled a complete circle, renouncing the "disparate impact" doctrine for constitutional analysis and substantially eroding its potency for statutory review. How far the courts will carry this line of logic remains to be gleaned from the progeny of *Davis* and *Gilbert*, but it seems likely that the Supreme Court will continue to limit the scope of federal protections and thus force individuals to seek relief from discriminatory practices under state constitutional and statutory provisions.

Unless the Supreme Court resolves the "motive/impact distinction," the power and the duty of school districts to correct school segregation may be eroded. There is no scientific standard that can be employedmeasure the specific intent or purposes behind one's acts or policies. It is a fairly objective task to evaluate whether or not segregation exists, but it is much more difficult to establish with certainty that a governmental agency's intentions are pure. Is a mere declaration of one's motives enough to establish that honorable intentions are present regardless of the disastrous results that the actions may produce? Or stated another way, how devastating must the results be in order for a discriminatory intent to be inferred? It is disheartening when one realizes that these questions remain as clouded, if not more so, than they were in 1954 when the landmark *Brown* decision was delivered. If a protected class may not rely upon social science evidence regarding the disproportionate impact of certain school practices as "proof" of racial discrimination, the mandate of *Brown* may soon become meaningless.

It is difficult to evaluate whether recent desegregation orders are indicators of a larger systemic change in the law of civil rights or whether the decisions should be viewed in isolation as having little precedential value.[39] It may be that litigation involving school desegregation is part of a more global legal phenomenon signaling judicial retrenchment from the activist Warren Court era. Indeed, this decade may be witnessing the emergence of a new definition of discrimination.

FOOTNOTES

[1] *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

[2] *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

[3] 269 F.Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

[4] *Spangler v. Pasadena City Board of Educ.*, 311 F.Supp. 501 (C.D. Cal. 1970).

[5] Booker v. Special School Dist. No. 1, Minneapolis, Minn., 351 F.Supp. 799 (D. Minn. 1972).

[6] *See Davis v. School Dist. of City of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *United States v. School Dist. 151 of Cook County*,

Illinois, 286 F.Supp. 786 (N.D. 111. 1968), *aff'd* 404 F.2d 1125 (7th Cir. 1969), cert. *denied*, 402 U.S. 943 (1971); *Soria v. Oxnard School Dist. Bd. of Trustees*, 328 F.Supp. 155 (C.D. Cal. 1971); *PeoPle v. San Diego Unified School Dist.*, 19 Cal. App. 3d 352 (Ct. App. 1971); *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972); *Cisneros v. Corpus Christi Indep. School Dist.* 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973); *School Commrs of Boston v. Bd. of Educ.*, 302 N.E.2d 916 (D. Mass. 1973); *Moss v. Stamford Bd. of Educ.*, 356 F.Supp. 675 (D. Conn. 1973); *Spangler, supra; Booker, supra; Hobson supra.*

[7] See "Busing: A Constitutional Precipice," 8 *Suffolk L. Rev.* 48 (1972).

[8] *Id.* at 57-59.

[9] David L. Dirp, "Race, Politics, and the Courts: School Desegregation in San Francisco," 46 *Harv. Educ. Rev.* 572 (1976).

[10] See Dale T. Brinkman, "'Intention' as a Requirement for De Jure School Segregation," 37 *Ohio State L. J.* 653 (1976).

[11] 313 F.Supp. 90 (D. Colo. 1970), *aff'd in part. rev'd in part*, 445 F.Supp. 990 (10th Cir 1971), *modified and remanded*, 413 U.S. 189 (1973).

[12] Id., 413 U.S. at 201-208.

[13] Id. at 219-224 (Powell, J., concurring in part, dissenting in part).

[14] *Id.* at 224.

[15] *Id.* at 256 (Rehnquist, J., dissenting).

[16] *Id.* at 257.

[17] See notes 1-6, *supra*.

[18] *Milliken v. Bradley*, 338 F.Supp. 582 (E.D. Mich. 1971), 345 F.Supp. 914 (E.D. Mich. 1972), *aff'd* 484 F.2d 215 (6th Cir. 1973), *rev'd* 418 U.S. 717 (1974).

[19] Id., 418 U.S. at 717 (Douglas, J., dissenting).

[20] See notes 29-34, *infra*.

[21] See for example, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

[22] See for example, *Romeo Community Schools v. Department of Health, Education and Welfare*, 14 FEP cases 1177 (1977).

[23] 401 U.S. 424 (1971).

[24] Id. at 432.

[25] 96 S.Ct. 2040 (1976).

[26] Id. at 2052-53.

[27] Id. at 2054 (Stephens, J., concurring).

[28] Id. at 2055-2062 (Brennan, J., Marshall, J., dissenting).

[29] *Pasadena City Bd. of Educ. v. Spangler*, 96 S.Ct. 416 (1976).

[30] *Austin Indepen. School Dist. v. United States*, 97 S.Ct. 517 (1976).

[31] *Pasadena, supra.*

[32] 97 S.Ct. 555 (1977).

[33] *Metropolitan School District v. Buckley*, 97 S.Ct. 802 (1977).

[34] *Dayton Bd. of Educ. v. Brinkman*, 45 USLW 4910 (June 27, 1977).

[35] However, the controversy continues as two weeks after the school board voted to scrap its current desegregation plan, the Sixth Circuit Court of Appeals ordered the school district to continue its court-ordered busing program pending an appeal by the NAACP, *Education Daily*, January 18, 1978. The fate of court-ordered busing in Dayton, therefore, is still undecided.

[36] See *Evans v. Buchanan*, 423 U.S. 963 (1975), 425 U.S. 950 (1976), 46 USLW 3162 (September 20, 1977). See also *Education U.S.A.* November 14, 1977.

[37] Although the Supreme Court seemingly is taking a tougher position on limiting the use of busing to achieve desegregation, a few decisions have partially muddied the waters. On the same day as the Indianapolis order, the Supreme Court refused to overturn a lower court ruling which required that each elementary school in Louisville, Kentucky have an enrollment of between 12½ and 35½ black. The Supreme Court's position was that the lower courts did not abuse their discretion by adopting stricter desegregation guidelines than those urged by city officials, *Bd. of Educ. of Jefferson County v. Newburg Area Council, Inc.*, 45 USLW 3503 (January 25, 2977). Also, in May, 1977 the federal court for the southern district of Ohio ruled that Columbus schools were guilty of intentional racial segregation because the board had maintained and enhanced racial imbalance by using such techniques as optional attendance zones, *Penick v. Columbus Bd. of Educ.*, 429 F.Supp. 229 (S.D. Ohio, 1977). In a case involving Omaha, Nebraska, the Eighth Circuit Court of Appeals held that there was evidence of discriminatory motivation because the natural and foreseeable consequences of the school district's actions were to create and maintain segregation, *School Dist. of Omaha v. United States*, 541 F.2d 708 (8th Cir. 1977), 46 USLW 3421 (January 3, 1978).

[38] 429 U.S. 125 (1976).

[39] See Thomas L. Flygare, "Austin and Indianapolis: A New Approach to Desegregation?" *Phi Delta Kappan*, Vol. 58, No. 9, May, 1977, p. 709.

THE BURGER COURT AND SCHOOL INTEGRATION, 1978: THE END OF THE SECOND RECONSTRUCTION PERIOD, 1954-1974

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The author reviews the legal position taken by the Burger court in relationship to school integration. This most provocative discussion is predicated on the position that the period between 1954 and 1974 has been a Second Reconstruction period which is now ending. The Supreme Court is identified as continuing to be almost radically conservative on the issue of school integregation. There is a discussion about the misleading distinction between de jure and de facto desegregation. The Milliken case is reviewed in light of the effect of a metropolitan remedy as an attempt to correct Constitutional violations. Brown discusses several specific changes which the Court has made which appear to limit further integration of public education. These changes include: (1) standing to sue; (2) opportunities to bring class action suits; (3) which tests of evidence will be used, including the strict scrutiny test; (4) de jure/de facto distinctions and intent to segregate; (5) limitations of remedies toward desegregation: and (6) the legal process for integration, attorneys fees and rights.

Several years ago when I started watching the U.S. Supreme Court on school integration issues for trends on a liberal-conservative continuum, I concluded that the jury was still out.[1] And, indeed, a survey of relevant material on the Court drew similar conclusions.[2] However, the verdict is in and discussions on the topic by law review articles,[3] books,[4] newspapers[5] and magazines[6] all rate the current Supreme Court as very conservative to radically conservative on school integration. Regarding the individual Justices of the Supreme Court, Robert C. Maynard placed them in three categories; Associate Justices William J. Brennan, Jr. and Thurgood Marshall are classified as liberals; Associate Justices Lewis F. Powell, Jr. and John Paul Stevens, Peter Stewart, and Byron R. White as moderates; and Associate Justices Harry A. Blackmon and William H. Rehnquist along with Chief Justice Warren E. Burger as conservatives.[7] However, on most important issues involving civil rights and human rights issues the Nixon-appointed conservatives can always count on at least two moderate Justices to join them.

How strong is the conservative trend by the Burger Court? John Bannon,[8] an attorney with the Civil Rights Division of HEW and writing for it, feels that the Court is conservative and states that:

> The Supreme Court. . . in its recent school desegregation decisions, has firmly embedded in our jurisprudence the misleading distinction between de jure and de facto segregation. De jure segregation is imposed by law; de facto segregation is assumed to occur because of neutral factors such as residence. It seems that, for the foreseeable future, the de jure/de facto distinction will be used to allow and legitimize segregation in the nation's schools. The Court's decision in the Detroit, Pasadena, and Austin school desegregation cases make this clear. These. . . cases have strengthened the de jure/de facto distinction in two ways: first, by limiting the scope of the remedy. . . , and second, by refusing to allow intent to segregate to be inferred from racially disproportionate impact or effect.

Derrick A. Bell, Jr. writing on the subject of school desegregation litigation for the *Yale Law Journal* states flatly that a lack of vigorous support by the Courts along with other changing conditions has just about ended public desegregation.[9] This view of the Court's status is also shared by Nathaniel R. Jones, General Counsel for the NAACP.[10] Jones agrees with Justice Thurgood Marshall's dissenting opinion in *Milliken v. Bradley* (418 U.S. 717, 1974), the Detroit school desegregation case. Marshall stated that:

> Today's holding, I fear, is more a reflection of perceived public mood that we have gone far enough in enforcing the Constitution's guarantees of equal justice than it is the product of neutral principals of law.

Jones saw in *Milliken v. Bradley* the culmination of a national anti-black movement and labelled the decision the "Detroit Dred Scott" decision.[12] U.S. Court of Appeals Judge J. Skelly Wright felt that the Court's decision in *Milliken* would result in a "national trend toward residential, political, and economic apartheid (which has) not only (been) greatly accelerated; it has been rendered legitimate and virtually irreversible, by force of law."[13] The late Justice William O. Douglas saw the *Milliken* decision as putting "the problem of blacks and our society back to the period that antedated the separate-but-equal regime of *Plessy v. Ferguson.*"[14] The feelings of these individuals can be summarized in historical and political terms. The second reconstruction era, 1954-1974, has ended. The first reconstruction era, 1870-1890, also lasted twenty years. As with the first reconstruction period we had the "Compromise of 1890" which culminated with a Supreme Court decision of 1896 (*Plessy v. Ferguson*[15]) which retarded racial progress with its "separate but equal" doctrine. Today, in the Detroit school desegregation decision in 1974 we see the culmination of the "Compromise of 1970", a retreat from aggressive state action to eliminate the negative effects of past and present racial discrimination.[16]

What did Justices Marshall and Douglas see in *Milliken* that escaped the general public? What did Circuit Judge J. Skelley Wright see? What did Nathaniel R. Jones of the NAACP see and the others concerned about racial equality in this country? The Supreme Court in *Milliken* changed several rules established by the Warren Court that would make it almost impossible for plaintiffs to seek redress through the federal courts. First, it changed the rules for presenting evidence in cases involving historical racism. While it had been a practice in such cases to place the burden of proof for non-discriminatory acts on school boards and state governments, the Court applied that principle to the City of Detroit but with suburban school districts the burden was shifted to the plaintiffs. And as history would have it, whoever has the responsibility for the burden of proof, loses. Thus, in reality a metropolitan remedy would be impossible because plaintiffs could never satisfy the Court's standards of proof; and when the Court added another burden for plaintiffs in 1976, not only must plaintiffs prove that extensive racial segregation exists but they must prove intent.[17] Second, the Court in *Milliken* held that for the purpose of law, education was a local function not a state function. Thus, it was not possible to seek relief from the state. Third, seemingly neutral residential policies that restrict blacks to ghettos would continue and so would segregated schools. Fourth, what Associate Justices Marshall and Douglas saw along with Circuit Judge J. Skelly Wright and Nathaniel R. Jones of the NAACP was that decisions of the Supreme Court are more closely related to the collective social and political values of the Justices rather than objective "facts," and that the conservative Court that former President Richard Milhous Nixon sought had been consummated. For example, the Bakke case which is currently before the Court claims that a white medical student was discriminated against in admission to the school, which is true. But the Fourteenth Amendment permits such discrimination if there is a "compelling state interest;" and the Court's decision in this case will depend more upon the Justices' collective value system, rather than an objective evaluation as to whether or not a "compelling state interest" existed that required some racial discrimination in medical school admissions. And whether or not such discrimination places a stigma of inferiority on the white race is also a value judgment.

Today we do not have to guess about the true mood of the Burger Court. The true mood of this Court is documented by the Court itself. In an arrogant opinion of the Court written by William H. Rehnquist in *Board of Curators of the University of Missouri v. Charlotte Horowitz*[18] in which a medical student who was dropped from the school a week short of graduation asked the school to give her a hearing, gives us a good example of the Court's mood. The student in this case, Charlotte Horowitz, filed a suit under the Civil Rights Act of 1871 (known formerly as the Klu Klux Klan Act and currently as 42 U.S. C. section 1983) asking that the university give her a hearing. Section 1983 states that an individual must be given a dismissal hearing if he has a property or liberty interest involved. The plaintiff claimed a liberty interest on the grounds that being dismissed would make it difficult for her to get future employment in the health field or get admitted to another medical school. The plaintiff cited prior Court rulings in these matters to back up her claim for a formal hearing.[19] The Burger Court held that prior decisions in this area, including such cases as *Sinderman*, *Roth*, *Biship*, and *Goss* had been misinterpreted. Further, that Ms. Horowitz had no liberty interest at stake; and even if she had, the university had already met the requirement of due process under the Fourteenth Amendment, the informal feedback given the plaintiff about her progress; and, in fact, the university went beyond what the Court would have required. The Court went to great lengths to give a more conservative interpretation of its earlier decisions in this area. While the Court separated academic dismissal from disciplinary dismissal, it went on to say that even here, its decision in *Goss* meant only that students must be given an informal hearing with school officials, and that no formal hearing was intended. The Court used a litany of cases, mainly state cases, dating back to 1913 to justify its decision on historical grounds. What is the message here? The Burger Court is using opinions of current cases to reinterpret earlier Court cases in a more conservative manner; and thereby saying to the members of the legal profession not to rely strictly upon earlier Court cases in preparing their briefs; check out our latest interpretation of the issues involved. The arrogant tone in which the opinion was written indicates more strongly what Justices Marshall and Douglas came to realize in 1974, that the "Nixon Court" had arrived.

From this point, I will discuss in more detail the basic changes made by the Court that may have doomed further integration of public schools: (1) standing to sue; (2) opportunities to bring class action suits; (3) what test of evidence will be used, the rational or strict scrutiny test; (4) de jure/de facto distinction and intent to segregate; (5) limitation on remedies for desegregation; and (6) the legal process for integration, attorneys' fees and rights. The Society of American Law Teachers' survey of the Supreme Court lists these areas as the ones where the most radical changes have occurred.[20]

STANDING TO SUE

The Court has stiffened its requirements of standing before the Court. Unlike the Warren Court, plaintiff now must demonstrate the Article III requirement of "injury in fact." Further, the Court has narrowed its interpretation of rules limiting the assertion of another individual's rights and has demanded proof from plaintiffs that the laws they were relying upon were designed to protect them.[21] The Court has made it more difficult for plaintiffs to bring suits against discrimination in federal courts.

The Court's reluctance to find "injury in fact" and grant plaintiffs standing to sue may be shown by three recent cases, *Warth v. Seldin*,[22] *Simon v. Eastern Kentucky Welfare Rights Organization*[23] and *Spangler v. Pasadena City Board of Education*[24]. In Warth, low to moderate income minority group members who lived in Rochester, New York but worked in the suburb of Penfield charged Penfield's exclusionary single-family and low density zoning ordinances as discriminatory. The Court denied them standing, because they could not demonstrate "injury in fact." The Court indicated that its standing requirement could have been satisfied only if a developer of a moderate income housing project had applied for permission to build and had been refused. The trial never took place. In *Simon* the Court denied standing to low income individuals who challenged an Internal Revenue Service ruling, eliminating a requirement that non-profit hospitals serve low income patients to the extent of their financial ability, which they claim violated the Internal Revenue Code, and encouraged hospitals to deny services to low income patients. The Court failed to see "injury in fact" because plaintiffs could not prove that a change in I.R.S. rules would result in increased services to low income patients. The Court reasoned that the hospitals could choose to give up their favorable tax treatment rather than provide increased services to low income patients. In *Spangler*, a school desegregation case involving the Pasadena public schools, parents opposed to Pasadena's desegregation order were not allowed to formally intervene in the case because they were not a part of the original suit and therefore they lacked standing. In comparison, a California Court allowed a group of parents opposed to school integration in the Los Angeles City Schools to intervene rather late in the case.[25]

Also, in *Warth* taxpayers of Rochester were denied standing to bring a suit against suburban Penfield for individuals who were unable to find housing in Penfield. Middle and upper income individuals could not assert the rights of low income individuals. But in *Singleton v. Wulff*[26] the Court granted standing to doctors to challenge a state law denying Medicaid benefits to patients who underwent certain abortions. Doctors were allowed to sue on behalf of their patients or assert the rights of others.

In the area of controversy, the Court has narrowed the definition. In *Rizzo v. Goode*,[27] a case involving claims of continued mistreatment of minority group members by the Philadelphia police department, the Court expressed serious doubts that the case met the Article III requirement of controversy. It is expected that similar cases brought before the Court in the future will be denied standing; that is, they will not be heard. The Burger Court has noticeably restricted the rights of plaintiffs to use the federal courts to correct abuses by state officials, especially those filing under section 1983 of the Civil Rights Act of 1871 by expanding the equitable restraint doctrine which states that a federal court will not ordinarily enjoin a pending state proceeding *(Huffman v. Pursue, Ltd.*, 420 U.S. 592, 1975).[28] That doctrine had been weakened by the Warren Court in *Dombrowski v. Pfister* (380 U.S. 479, 1975) which involved a Louisiana subversive law used to harass blacks.

Closely related to standing to sue is the concept of mootness. In the *De Funis*[29] case in which a white student challenged the University of Washington's Law School admission policy, the Court ruled the case was moot because it was not a class action suit and the plaintiff had graduated (which was what he asked for). *De Funis* only asked that he be admitted. In *Jacobs v. Board of School Commissioners of Indianapolis*,[30] a case involving students who fought to get their newspaper published was ruled moot because the students had graduated. In school desegregation cases, however, the Court to date has refused to declare them moot because original plaintiffs had graduated.[31]

On a related matter, the exhaustion of state non-judicial remedies before plaintiffs in school desegregation cases can sue are generally not required.[32] Such a requirement would delay school integration cases for years.

STANDING TO SUE VIA CLASS ACTION

Class action is a special form of standing to sue. In most school integration cases, class action status is a must. Class action suits were developed in order to serve many individuals with similar claims. Although the Burger Court still grants class action suits, it has narrowed rules for granting class action status. The four conditions for granting class action status are that: 1. the class must be so numerous that joinders of all members is impractical; 2. the question of law must be common to all members of the class; 3. the claims of the parties must be typical of the entire class; 4. the representative parties of the class must be able to adequately protect the interest of the class; 5. class action must be superior to other methods; and 6. in non-civil rights class action suits, each member of the class, individually, must show a potential loss of at least $10,000.[33] The Civil Rights Act of 1871 (42 U.S.C., 1983) does not require proof of loss in any amount, but it does require individual notice to all members of the class.

Class action rules which require notices to all members of the class, and which require that representative parties must be able to protect the interest of the class, are very important for plaintiffs who are poor. A few class action suits have been denied standing because plaintiffs were considered too poor to sustain a lengthy and costly law suit. This could make it difficult for poor people to bring suits against local school systems. The Court has also restricted the payment of attorney fees in class action suits making it difficult for poor plaintiffs to secure legal assistance.[34]

JUDICIAL TEST FOR EVIDENCE

To this point, I have been discussing techniques in getting the Court to hear your case; now rules for the trial must be established. The Court generally will employ either the: 1. traditional test where the burden of proof is on those challenging a state policy; 2. or the strict scrutiny test where the burden of proof is on the state. The strict scrutiny test is employed when the Court had decided that the State must show a "suspect" classification such as race is involved. Therefore, the big battle is over what test will be applied. If the strict scrutiny test is applied the State will nearly always lose; and if the traditional test is applied the plaintiffs will nearly always lose.

The importance of the judicial test applied in a case is clearly stated by Justice Marshall in a suit challenging the mandatory retirement age for Massachusett's state policemen.[35] The Court in this case reaffirmed its requirement stated in *Rodriguez*,[36] that there is strict scrutiny of a legislative classification only when the classification interferes with the exercise of a "fundamental" right or operates to the disadvantage of a particular "suspect" class. Justice Marshall in his dissenting opinion cited several cases suggesting application of the strict scrutiny test and noted that although the Court outwardly adheres to the notions of "fundamental" rights and "suspect" classes, it had apparently lost interest in their continued recognition.

Six other cases illustrate Justice Marshall's opinion about the application of strict scrutiny test of evidence by the Burger Court. In *Mathews v. Lucas,*[37] the Court denied the "suspect" classification to illegitimate children. Plaintiffs challenging school board reapportionment in Louisiana were denied the strict scrutiny test on both "fundamental" rights and the "suspect" classification.[38] Plaintiffs in Mississippi were denied the strict scrutiny test involving a district hiring policy brought by the Justice Department.[39] While in school integration cases in Detroit[40] and Buffalo[41], the strict scrutiny test was granted to challenge within-district segregation, but the traditional test was granted to challenge metropolitan segregation involving their suburbs.

Departure of the Supreme Court from its tradition of granting plaintiffs in school integration cases the strict scrutiny test came about when the issue was no longer de jure segregation, segregation by law, but de facto segregation due mainly to segregated housing patterns. In the Denver[42] school integration case, plaintiffs were denied the strict scrutiny test, but the Court shocked the educational community when it declared that education was not a "fundamental" right, nor would the Court consider low income students a "suspect" classification.[43] The "fundamental" interest concept is in essence the Ninth Amendment to the U.S. Constitution, which states that rights enjoyed by the people but not listed in the Constitution cannot be taken away. However, it is up to the Court to decide what rights not listed in the U.S. Constitution are fundamental. In the Texas school finance case, the Court decided that education was not a "fundamental" right. This is a very narrow interpretation of the Ninth Amendment.

The Warren Court had expanded the strict scrutiny principle by adding to "suspect"classification the concept of "fundamental" interest could lead to strict scrutiny of the evidence. Generally, fundamental interest issues involved race, voting,[44] interstate travel[45], and appeals in criminal cases.[46] However, the Burger Court in *Rodriguez*[47] refused to grant fundamental interest status to education. The exception is sex. The Burger Court granted this status to sex in *Craig,*[48] but this may be considered dictum, a case ruled on because the situation was so outrageous rather than a sign of change of direction by the Court. In *Craig,* an Oklahoma law allowed eighteen-year-old females to buy beer, but males had to be twenty-two years old in order to buy beer. The state argued that the law was necessary to maintain traffic safety since more males were involved in traffic accidents than females. The Court invalidated the law.

DE JURE/DE FACTO/INTENT

Since *Keyes*, the 1973 Denver school integration case, the Court made a clear distinction between de jure segregation by law and de facto segregation due mainly to housing patterns. The Burger Court differs significantly from *Brown*, the 1954 school desegregation case, in that harmful effects of segregated schooling are not considered in rendering its decision; the only important item for the Burger Court is whether or not segregation was due to official state action.[49] The Burger Court is only concerned with "intended" or de jure segregation. School boards action must have reasonably foreseen the consequences of their action as evident in *Diaz v. San Jose*,[50] *Husbands v. Pennsylvania*,[51] and *Hart v. Community School Board of Education*.[52] However, there is difficulty in defining intent. Justice Steven admitted as much in *Washington v. Davis*, that defining the collective will of a group will be difficult. There are evidentiary problems; judges just rely upon their knowledge of human nature in making decisions about intent. Decisions by trial judges are difficult to review by appellate courts because much depends upon the credibility of statements made by school officials at a particular time.

In *Austin Independent School District v. United States*[53] the Court summarily vacated the Fifth Circuit judgment that relied upon the foreseeable test and remanded the case back to the Fifth Circuit Court of Appeals in light of *Washington v. Davis* which used the intended purpose test. In *Oliver v. Michigan Board of Education*[54] the Sixth Circuit defined "intent" by looking at school board policies that lead to legitimate educational objectives rather than at board statements of motives. In *U.S. v. Omaha School District*[55] the district court dismissed, ruling that plaintiffs had failed to carry their burden of producing evidence from which segregative intent could be inferred. On appeal, the Eighth Circuit Court of Appeals reversed, stating that a presumption of segregative intent arises once a plaintiff establishes that school authorities engaged in acts of omissions or actions and foresaw the consequences of their actions or inactions. In the Omaha case a big factor that led to segregative intent was faculty segregation. The Court held that faculty assigment was one in which the board had complete control and could have integrated.

In *Craig v. Boren*,[56] the 1976 Oklahoma case involving sex discrimination in the rights to buy beer, the Court gave us its definition of segregative intent. The Supreme Court stated that school board actions or inactions must be rationally related to goal achievement. Rather than asking whether the classification is necessary to promote a government interest, the new standard asks whether it is substantially related to promoting that interest. The new standard asks whether government objectives are important and compelling. Thus, being important may not be compelling. However, the U.S. Second Circuit Court of Appeals in a March 1978 decision involving the Buffalo integration case of which I am a consultant for the plaintiffs uses the "foreseeable consequence" test of intent instead of the new "substantially related" test issued by the Supreme Court in *Craig*; and in keeping with *Milliken* the Second Circuit dismissed the state as a defendant in the case.

In *Keyes*, the concept of intent was born, but the Court did not define intent. In *Hart* the Court used an objective tort standard of reasonably foreseeable consequences of action test to define intent. In contrast, in *Husbands*, the Court held that intent meant subjective motives by school boards to segregate. This definition would make it difficult for plaintiffs to meet with respect to the quality and quantity of evidence necessary to sustain their burden of proof.[57] And in *Craig* we have the substantially related test by Supreme Court.

The courts generally look at school board policies in five areas for segregative intent: faculty assignments; faculty and student transfer policies; conversion of feeder schools; school site selection; and changing attendance zones. But, there is evidence that government may pursue segregative goals in more subtle ways, by drafting legislation which appears race-neutral, but nevertheless has a disproportionately negative impact on racial minorities; and by administering otherwise race-neutral laws so as to disadvantage racial minorities.[58] (*Jefferson v. Hackney*, 406, 535, 1972 - differential impact; *Yick Wo v. Hopkins*, 118 U.S. 356, 1886 - discriminatory administration) A classic case of government's ability to use race-neutral laws to achieve segregative intent is seen in Yick Wo, an 1886 case in which the City of San Francisco wanted to get rid of Chinese laundries and, knowing that most were made of wood, passed a law banning all laundries made of wood. The Court invalidated the law. Clearly, the concept of intent or motive to segregate is a radical departure from the Warren Court, for as late as 1971 in *Palmer v. Thompson*[59] the Court rejected intent and ruled on disproportional impact.

REMEDIES

Requirements by the Burger Court of school districts to correct for racially segregated schools once found guilty of such practices is perhaps the Court's weakest linkage in the school integration process. In many instances, the Court has allowed school officials to fashion their own school integration plans.[60] Generally, remedies selected by local boards have resulted in continued segregation of the schools. Illustrative of this point is the remedy approved for the Buffalo, New York public schools.[61] The Buffalo plan called for a series of "magnet schools" which resulted mainly in white students remaining in their neighborhood schools and black students being bussed out of their neighborhoods. A similar situation exists in Detroit and the Houston public schools.

With several cases, as stated earlier, the Court has recommended no remedies for de facto segregated school districts, if no intent to segregate by school officials was found. Generally, metropolitan remedies have not been approved; and in an unexpected decision the Court in the Pasasena, California case made it possible for school districts once integrated, and later segregated because of shifts in population, to remain segregated.[62]

The retreat by the Burger Court on school desegregation remedies is amply illustrated in a March 1978 decision by the Second Circuit Court of Appeals in the Buffalo case. The Buffalo desegregation case on appeal from the district court by the school district upheld the district court's ruling that officials in Buffalo were guilty of segregative intent, but gave specific advice on remedies. Citing Supreme Court decisions on school desegregation remedies in Omaha and Dayton the Second Circuit Court of Appeals stated that:

> The Supreme Court has made it clear in its recent opinions that not only must a remedy be appropriate to an infraction, but also that it can reach no further than the incremental harm caused by the infraction itself. If such violations are found, the district court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effort these violations had on the racial distribution of the school population as presently constituted, when compared to what it would have been in the absence of such. . .violations. The remedy must be designed to redress that difference and only if there has been a systemwide impact may there be a systemwide remedy.

The Court also ordered the district court to take into consideration the motives of present Buffalo School Board members in formulating a remedy. This places the district court in a difficult position of determining how much segregation was due to many years of cumulative acts by the Board and to defend its decision before the Court of Appeals; and remedy suggested by the district court will almost certainly be appealed by the school board. This situation would tend to lead to conservative recommendations of a remedy by district court judges. Given this situation, and drawing upon my experience in the Buffalo case (and in conversation with individuals involved in other school integration cases) school districts are just dragging out that phase of court proceedings designed to determine guilt and concentrating their efforts on narrowing the scope of a court-ordered remedy, the second phase. In fact, that is the stated strategy of the school board lawyers in the Buffalo case. The case is now in its sixth year and a final remedy is nowhere in sight; and if and when it comes it will probably be a very limited one. In practice, the courts have ruled that in de facto segregated communities, the degree of de jure segregated schooling in that community must be limited to approximate residential segregation. Thus, we have a return of the neighborhood school concept, without the right of school boards to change zoning patterns to shift pockets of whites from a black school to a nearby white school. Further, once integrated and resegregated due to shifting residential patterns, the courts have barred further integration remedies; and for those that are desegregated for eight years or more to use extensive tracking of pupils that results in all black classes.[63]

ATTORNEY'S FEES, LAWYER-CLIENT RELATIONS, AND JUDGES

In addition to the Burger Court changing interpretations of the Constitution, the Court has placed restrictions on the ability of plaintiffs to obtain legal counsel despite the right of individuals to bring action against the state.[64] First, the lawyer-client relationship in most civil rights cases is considered unethical by most states and may lead to a loss of an attorney's license to practice law.[65]

The Warren Court in the 1950's approved of this special lawyer-client relationship by the NAACP in a Virginia case involving civil rights.[66] In most civil rights cases, the lawyer usually seeks out plaintiffs to participate in a class action suit and thereafter, plaintiffs are rarely involved in court proceedings or in its outcomes. That situation is changing; states sensing the conservative trend of the Supreme Court are beginning to apply the standard lawyer-client relation rules to civil rights cases. In South Carolina, for example, in 1973 an American Civil Liberties Union attorney attended a meeting with women ordered to submit to forced sterilization to advise them of their rights. The South Carolina Bar charged that the ACLU lawyer had violated legal ethics by soliciting business; and the state Attorney General argued before the U.S. Supreme Court (1977) that the ACLU attorney urged women who had been sterilized to file suit against the doctors and the state.[67] If the Court rules in favor of South Carolina, there will be fewer lawyers willing to get involved in civil rights cases.

Second, in the area of attorneys' fees, Title VII (and Title II) of the Civil Rights Act of 1964 provides for reasonable fees to be awarded to the winning party.[68] School board lawyers supported by tax dollars may drag out court proceedings with delaying tactics and will be paid regardless of the outcome of the case while plaintiffs' lawyers must win their case in order to be adequately reimbursed for their services. However, the level of reimbursement is changing. In *Keyes*, the amount awarded plaintiffs' lawyers was reduced by fifty percent by the Circuit Court, with the explanation that attorneys involved in public service usually do so for half their usual fee; and well-paid school board attorneys usually spent a lot of time in court arguing against requested attorney's fees for plaintiffs.

The other areas that might tend to make integration remedies more difficult involve the political nature of upward mobility by district court judges who must try these cases and supervise their implementation. In writing opinions in desegregation cases, it is in the judge's best interest to be conservative and not have his decision reversed. To have too many decisions reversed is an indication that one is not ready for a higher level judgeship. And in most states, recommendations for judgeships are performed by political parties; and to become known as a "forced busing" judge is not the best way to be promoted or even retained in one's current position.

SUMMARY

The school integration movement is over. The second reconstruction, 1954-1974, is over with the "Compromise of 1970" that was legitimized in 1974 with *Milliken*, the Detroit desegregation case. The current fate of school integration is succinctly put in a March 1978 issue of the *New York Times:*[69]

> The Supreme Court has issued rulings over the last year that delayed busing plans in half a dozen cities. Congress has passed an amendment that virtually halted attempts by the Federal Government to desegregate schools through

> executive action. The Court and Congress seem to be reflecting a national mood that opposes aggressive attempts by racial minorities to gain a larger share of the political and economic pie.

Justices Marshall and Douglass and Nathaniel Jones of the NAACP saw this mood in 1974. What then are our options, if further Court-ordered school integration has ended? I suggest three strategies to be employed concurrently: one judicial, one political, and one legislative. In the courts, I suggest that we follow the lead suggested in *Keyes*, the Denver school integration case. In *Keyes*, the Court ordered the de facto school system to meet standards laid down by *Plessy* in 1886. That is, in all areas of education make ghetto schools equal in every way to non-ghetto schools. This, in my opinion, may be more difficult for school districts to accomplish than integration. In fact, many school districts if given a choice may opt for integration rather than meet the standards of *Plessy*. Politically, I suggest that we attempt to do what former President Franklin D. Roosevelt attempted to do in the 1930's and what former President Richard M. Nixon did in the 1960's: change the complexion of the Supreme Court with new appointees.[70] Legislatively, I suggest that Congress pass legislation aimed at making ghetto schools more productive. This legislation would complement current compensatory education programs. I recommend that the federal government create a new program to award schools for increased productivity: productivity is defined as the percentage increase of students enrolled in the upper levels of college (juniors and seniors) over the district's last five year average. To get this increase districts (teachers) would be forced to eliminate ability groupings and concentrate on teaching literacy skills in the verbal domain. I suggest that these federal incentive grants be attached to school district personnel salaries as a bonus in direct relation to the percentage of disadvantaged students in their schools. Another distribution formula will have to be worked out for central office personnel. This program will serve primarily as an urban school fund, because it is unlikely that rich suburban schools will be able to increase the percentage of college-bound students from their schools. Urban schools will feel the major impact of this legislation. The war is over and we have lost, so let's regroup and come out fighting.

FOOTNOTES

[1] Brown, Frank, "The Equal Protection Clause, School integration, and the Burger Court," paper presented at the Annual Conference of NOLPE, November, 1976,Atlanta.

[2] Case, Harold W., *et al.*, *The Constitution and What It Means Today*, 13th edition, Princeton University Press, 1975, p. 245; Lamorte, Michael, "The Burger Court: Its Liberal/Conservative Attitude Toward Educational Issues," a paper presented at the Annual Meeting of the American Educational Research Association, April 1977, New York.

[3] Scott, H. Brice, "Standards of Judicial Review Under the Equal Protection and Due Process Clause," *Southern California Law Review*, Volume 50, No. 4, May 1977: 689; John E. Nowak, "The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the 11th and 14th Amendments," *Columbia Law Review*, Volume 75, No. 8, December 1975: 1413; Notes,

"Intention as a Requirement for De Jure School Segregation," Ohio State *Law Journal*, Volume 37, No. 3, 1976: 653; and Comments, "Restriction of Access to Federal Courts: The Growing Role of Equity, Comity, and Federalism," *Temple Law Journal*, Volume 50, No. 2, 1977: 320.

[4] Harold W. Chase and Craig R. Ducat, *1976 Supplement to Edward S. Corwin's The Constitution and What It Means Today*, Princeton University Press, 1977: School Desegregation in Metropolitan Areas: Choices and Prospects, "*The National Institute of Education*," October 1977. This is an edited text with several authors expressing their views.

[5] *New York Times*, December 2, 1977: *Buffalo Evening News*, February 16, 1977.

[6] *Black Enterprise*, Volume 8, March 1978; *Civil Rights Digest*, Volume 9, No. 4, Summer 1977.

[7] Robert C. Maynard, "Blacks and the Burger Court: The Case of the Narrowing Path to Justice," *Black Enterprise*, Volume 8, No. 9, March 1978.

[8] John Bannon, "Legitimizing Segregation, The Supreme Court's Recent School Desegregation Decision," *Civil Rights Digest*, Volume 9, No. 4, Summer 1977.

[9] "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Yale Law Journal*, Volume 85, 1975-76: 470.

[10] Nathaniel R. Jones, "Metropolitan Desegregation: Where Are the Courts Heading?" *School Desegregation in Metropolitan Areas: Choices and Prospects*, National Institute of Education, March, 1977.

[11] *Ibid*, p. 66.

[12] *Ibid*, p. 66.

[13] *Ibid*, p. 63.

[14] *Ibid*, p. 63.

[15] 163 U.S. 537 (1896).

[16] *Milliken v. Bradley*, 418 U.S. 717 (1974).

[17] *Washington v. Davis*, 96 S. Ct. 2040, 2054 (1976); U.S. LW 4789 (1976).

[18] 538 F. 2d 1317 (1976); 542 F. 2d 1335; 430 U.S. 964 (1977).

[19] *Perry v. Sinderman*, 408 U.S. 593 (1972; *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bishop v. Wood*, *426 U.S. 341; Goss v. Lopez*, 419 U.S. 565 (1975).

[20] "The Burger Court's Efforts to Close the Federal Courthouse to Public Interest Legislation," A statement of the Board of Governors Society of American Law Teachers, New York, October 10, 1976.

[21] Society of American Law Teachers, *op. cit.*

[22]. 442 U.S. 490 (1975).

[23] 96 S. Ct. 1917 (1975).

[24] 553 F. 2d 992 (5th Cir., 1977).

[25] *Bustop v. Superior Court of the State of California* for the County of Los Angeles, 137 Cal. Rptr. 793 (Cal. App. 1977).

[26] 96 S. Ct. 2871 (1976).

[27] 96 S. Ct. 598 (1976).

[28] See: "Restrictions of Access to Federal Courts: The Growing Role of Equity, Comity, and Federalism," Temple Law Journal, Volume 50, No. 2, 1977: 320; and "Our Federalism - The Limitation of Younger-Samuels and Their Progeny on Federal Intervention in State Court Proceedings," *Missouri Law Review*, Volume 42, No. 4, 1977: 559.

[29] *De Funis v. Odegaard*, 416 U.S. 312 (1974).

[30] 420 U.S. 128 (1975).

[31] For additional readings on standing to sue see: Albert, "Standing to Challenge Administrative Action An Inadequate Surrogate for Claim for Relief," 83 *Yale Law Journal*, 425, 1974; Scott, "Standing in the Supreme Court, a Functional Analysis," 86 *Harvard Law Review*, 645, 1973; Stewart, "The Reformation of American Administrative Law," 88 *Harvard Law Review*, 1723-47, 1975; and Note, "Standing to Raise Constitutional Jus Tertii, 88 *Harvard Law Review*, 423, 1974.

[32] Bator, Paul M., *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System*, 1977 Supplement, Mineola, N.Y.: The Foundation Press, Inc. 1977, p. 158-159; also see comments in Comment, "Exhaustion of State Administration Remedies in Section 1983 Cases, 41, *Univ. of Chicago L. R.* 537, 1974.

[33] Rule 23(a), Federal Rules of Civil Procedure as Amended in 1966. Also see: Nolte, M. Chester, "Standing to Sue: A Fresh Look at Class Actions" in *Current Legal Issues in Education* by M.A. McGhehey, National Organization on Legal Problems of Education, 1977. Also see "Developments-Class Actions," *Harvard Law Review*, Volume 89, No. 7, May 1976: 1319.

[34] Society of American Law Teachers, *op. cit.*; "Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants," *Wisconsin Law Review*, Volume 1976: 207.

[35] *Murgia v. Mass. Board of Retirement*, 427 U.S., 96 S. Ct. 2562, L. Ed. 2d (1976).

[36] *Rodriguez v. San Antonio Independent School District*, 4111 U.S. 1 (1973).

[37] U.S. 427 (1976).

[38] *Panoir v. Iberville Parish School Board*, 536 F. 2d 101 (5th Cir., 1976).

[39] *U.S. v. Corinth Mun. Separate School District*, 414 F. Supp. 1336 (N.D. Miss. 1976).

[40] Milliken v. Bradley, 411 F. Supp. 937 (E.D. Mich. 1975).

[41] *Arthur v. Nyquist*, 415 F. Supp. 904 (W.D. NY 1976).

[42] *Keyes v. School District No. I, Denver Colo.*, 413 U.S. 189 (1973).

[43] *Rodriguez v. San Antonio Independent School District*, 41 U.S. 1 (1973).

[44] *Harper v. Virginia Board of Elections*, 383, U.S. 663, 1966.

[45] *Shapiro v. Thompson*, 394 U.S. 618, 1969. (residency requirement for welfare).

[46] *Douglas v. California*, 372 U.S. 353 (1963).

[47] 411 U.S. 1, 1973.

[48] Craig v. Boren, 975 Ct. 451, 1976.

[49] "Reading the Mind of the School Board: Segregative Intent of the De Facto/De Jure Distinction," *Yale Law Journal* Volume 86, 1976:292.

[50] 412 F. Supp. 310, 329, N.D. Cal. (1976).

[51] 395 F. Supp. 1107, 1132 E.D. P2 (1975).

[52] 512 F. 2d, 50, 2nd Cir (1975).

[53] 45 USLW, 3413, U.S. Dec. 6, 1976.

[54] 508 F. 2d 178 6th Cir (1974), Cert. denied, 421 U.S. 963 (1975).

[55] 389 F. Supp. 293, D. Neb. (1974); 521 F. 2d 530, 536 (8th Cir), 423 U.S. 946 (1975). Also see: "Intent to Segregate: The Omaha Presumption," *George Washington Law Review*, Volume 44: 775, August 1976.

[56] 97 S Ct. 451, 1976.

[57] "Intention as a Requirement for De Jure School Segregation," *Ohio State Law Review Journal*, Volume 37, No. 3, 1976: 653; "Constitutional Law-Disparate Impact of Legitimate State Stature on School District Does Not Violate Constitutional Rights Absent Showing of State Supported De Facto Segregation. . .," *Temple Law Journal*, Volume 50, No. 2, 1977: 372.

[58] John Leubsdorf, "Completing the Desegregation Remedy," *Boston University Law Review*, Volume 57, No. 1, January 1977: 39.

[59] 403 U.S. 217, 1971.

[60] *U.S.A.v. Hale County Board of Education*, 423 F. Supp. 275 (D.C. Ala., 1977); Dawson v. Troxel, 561 F. 2d 694 (Washington App. 1977); *Stout v. Jefferson County Board of Education*, 537 F. 2d 800 (5th Cir., 1976); and *Arthur v.* Nyquist (Buffalo, N.Y.) 415 F. Supp. 904 (W.D. NY 1976).

[61] *Arthur v. Nyquist*, 415 F. Supp. 904 (W.D. NY 1976).

[62] *Spangler v. Pasadena City Board of Education*, 44 USLW 5114 (June 28, 1976).

[63] *McNeal v. Tate School District, (Miss.)*, 508 F. 2d 1017 US App., 5th Cir. (1975).

[64] John E. Nowak, "The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the 11th and 14th Amendments," *Columbia Law Review*, Volume 75, No. 8, December, 1975: 1413.

[65] Derrick A. Bell, Jr., op. cit.

[66] *Ibid.*

[67] *Black Enterprise*, Volume 8, No. 8, March 1978, p. 12.

[68] "Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants," *Wisconsin Law Review*, Volume 1976: 207.

[69] *New York Times*, March 13, 1978, p. 1.

[70] John Coons, a Professor of Law at the University of California at Berkeley with extensive writings and involvement in school integration cases, stated in an address at the Annual Conference of the National Organization for Legal Problems in Education, that all things being equal, whether you won your case depended upon which judge you drew. 1977.

DESEGREGATION: FUTURISTIC CONSIDERATIONS

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The author addresses himself to the present status of desegregation but also attempts to assess the future role and implications of school desegregation from a legal perspective. Carter presents a review of historical perspectives underlying desegregation attempts. Reviewing Brown *and recent court reforms, the essence of the discussion focuses on recent court actions including* Pasadena City Board of Education v. Spangler, Washington vs. Davis, Dayton vs. Brinkman *and the* Offman *case. Carter makes some rational predictions regarding the future of school desegregation. The author takes a somewhat more positive view of the future for the integregation of schools, and eventually of American society, than that taken by several other authors.*

> School desegregation is today the most fervently debated of educational policy issues. While that has been intermittently true for the past quarter-century, the focus of the desegregation discussion has shifted. Until recently there was broad concensus, at least within what might be called the enlightened community, that racial justice could be secured only through desegregation and that the courts were the one institution fit (or at least willing) to attempt that task. But as the effects of desegregation began to be felt in the North and West, what was previously taken as a given has now become a source of conflict.[1]

The contemporary judicial landscape is cluttered with school desegregation decrees, many of which are enmeshed in controversy. Both liability and remedy questions persist, and new issues constantly emerge as the courts pronounce more desegregation orders.

For the past two decades, the opening of public schools has been the occasion of tension and often violence for many school districts constrained to implement desegregation orders. Not surprisingly, some twenty years later, a sharply divided Supreme Court has appeared to waver on and even partially withdrawn from the inevitably controversial task of implementing the *Brown* decision. As Judge J. Skelly Wright has written, "One of the remarkable aspects of the *Brown* case is that it challenged the notion that segregation may be compatible with equality in the context of an institution at the core of the American way of life."[2]

The point is, the United States, traditionally considered the protector of individual freedom, remains in turmoil as it struggles to make educational opportunities a reality for minority group members shut off from the American dream. Even as those of good will continue to press for the implementation of the *Brown* decision, others continue to argue the wisdom of adding educated minorities.

THE HISTORICAL PERSPECTIVE

It provides some perspective, if little comfort, to recall that resistance to segregation (a significant precursor to drive toward integration) hardly started with the *Brown* decision. It weaves through the historic fiber of this country even before the abolitionists and Abraham Lincoln. Addressing this historical hostility to segregation, a number of articles and studies have raised the question of whether "we are going to continue to move toward two separate societies or to begin to learn to live and to grow together in the development of a truly multi-racial society.[3]

The article just quoted does not address the effectiveness of desegregation in this country; rather it analyzes a selected number of cases in an effort to speculate on the future of desegregation in America. In this article, I will examine four selected desegregation cases. But I will preface this examination with an historical perspective on desegregation litigation in this country.

One perhaps naive premise of the *Brown v. Board of Education* decision was that racial injustice could be eliminated through desegregation directed by the courts.[4] Still, twenty-three years after that *Brown I* decision, segregation continues to be one of the most (if not the most) disturbing and complex issues confronting the country. Since *Brown*, the roots of segregation have not changed—only the deceits by which it is effected. The current deception is called "the issue". The failure to distinguish between means (busing school children) and ends (school desegregation) has so exercised this country that Americans have ignored the goal to which they are legally comitted—the education of all its children. Never before in the history of American public education, has an issue evoked as much furor as the present controversy over school busing; but

> busing is not now and never has been the issue. It has only been used as a subterfuge to cloud the real issue, which is: Are we going to continue to move toward two separate societies or are we going to begin to learn to live and to grow together in the development of a truly multi-racial society?[5]

In retrospect, one sees that when the Supreme Court ruled that segregating school children on the basis of race was unconstitutional, the Constitution changed much more significantly than the schools. In practice, the decision failed, as *Brown II*[6] (1955) did, to inspire reform in the schools with all "deliberate speed."

Until the passage of the 1964 Civil Rights Act, the adherents of integration followed the strategy of dynamic gradualism—circumventing the laws they considered unjust with acts of civil disobedience in order to build the rationale for legal and judicial intervention. For their part, the enforcement agencies responded to noncompliance with the *Brown* decision only half-heartedly and belatedly. This is not to say that progress has not been made in law enforcement since 1954, only that those who viewed the *Brown* decisions as the end to segregation assumed far too much.

THE BEGINNING

The decision set forth in *Plessy v. Ferguson*,[7] upheld a Louisiana statute permitting separate educational facilities for blacks and whites as long as they were in fact, "equal". While bound by this rule, the court in *Sweatt v. Painter*[8] examined whether intangible educational benefits were equally provided to both races. The *Sweatt* case served as *MENE, MENE, TEKEL, UPHARSIN*[9] for those who championed segregation that the wall separating the races educationally would soon crumble.

Segregation in public schools lost ground on May 17, 1954, when the United States Supreme Court consolidated four cases from the states of Kansas, South Carolina, Virginia, and Delaware[10] raising a common issue into *Brown v. Board of Education*. In an oft cited paragraph, the Supreme Court construed state-imposed segregation of black and white students in public schools as unconstitutional. Speaking for the Court Chief Justice Warren said, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[11]

Once the Supreme Court interpreted the equal protection clause of the Fourteenth Amendment as prohibiting state-imposed segregation, the Court was faced with implementing its decision. One year later, the Supreme Court handed down a unanimous decision that addressed the implementation of the mandate set it forth in *Brown I*. The implementation decision is known as *Brown II*.

REFORM SINCE 1964, THE COURTS, AND DYNAMIC GRADUALISM

During the years following *Brown II* the Supreme Court refrained from active involvement in the desegregation process; rather it relied on the lower courts to bring about desegregation with all "deliberate speed." The Court further charged school boards with "the affirmative duty to take whatever steps might be necessary to eliminate racial discrimination 'root and branch'.[12] But concerned with the slow rate of progress, the Court, on May 27, 1968 rendered a decision in *Green v. County School Board*[13] that set the stage for a new era in school desegregation.

In *Green* the court first adopted the percentage of black and white students attending a given school as the primary indicator of whether a desegregation plan had been effective in achieving a unitary nonracial school system.

But instead of reducing the number of desegregation cases, the *Green* decision actually increased the litigation as school systems began to avail themselves of the loopholes that decision created. The loopholes I speak of appeared when the Court failed to define what a working desegregation plan would entail or what the specific characteristics of a unitary school system were. The ambiguity surrounding these two points perpetuated confusion and further litigation.

Not until June 29, 1970, did the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* address some of the complex problems raised in earlier busing decisions.[14] Federal District Court Judge James McMillan of Charlotte, North Carolina, had rendered a decision in *Swann* that supported racial balancing. Judge McMillan's decision necessitated busing school children in metropolitan Charlotte and Mecklenburg County.[15]

When the Supreme Court granted certiorari in the *Swann* case, school districts everywhere waited anxiously for its decision; and while the case was under consideration, the federal courts operated without definite guidance on the extent to which busing could be used to effect desegregation. The Supreme Court Justices noted that bus transportation had been an "integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room school-house to the consolidated school."[16] The Court followed this rationale to uphold the concept of busing to achieve racial balance in the schools.

Reaction to the Supreme Court's ruling in *Swann* came quickly, and those against the remedy proposed a number of alternate means for limiting or eliminating busing. Therefore, soon after the *Swann* decision came the inevitable; metropolitan school desegregation suits seeking to eliminate desegregation by crossing school district boundaries but also increasing court-ordered transportation of students. *Keyes V. School District No. 1*,[17] *Milliken V. Bradley*,[18] *Tallulah Morgan et al. v. John J. Kerrigan et al*,[19] represent a few of the more controversial cases involving school busing. The *Swann* decision, the last unanimous Supreme Court decision in the area of segregation, raised far more questions than it solved.

FUTURE

The writer contends that Court decisions can serve as a guide for determining whether access to equal educational opportunity will become a reality for all Americans two decades hence. Past Court decisions in general, tend to support the future. Thus, we can expect segregation to continue as one of the nation's more pressing problems. "Tenuous as the art of predicting the future is, this speculation appears relatively assured, if the slow judicial momentum so evident in recent court decisions represent the trend of the future."[20]

Pasadena City Board of Education v. Spangler[21] represents one such incremental move in the trend. In *Spangler*, the Supreme Court held that the District Court had exceeded its authority in refusing to modify a desegregation order that required annual readjustments of student attendance zones in response to demographic shifts.

In 1970, the District Court concluded that the Pasadena school system was unconstitutionally segregated,[22] and it ordered the system to submit a desegregation plan. Pasadena included in its desegregation plan the understanding that no school would have the majority of any minority students. Although the school system initially complied with the Court's requirement to assign students to schools neutrally, in 1974, the school board sought relief because some of the schools in the district had already violated the requirement. On appeal, the Ninth Circuit Court of Appeals held the annual readjustments of student attendance zones to be unacceptable. But, the Ninth Circuit Court went on to affirm the District Court's denial of relief. It noted these two points: (1) The school system had only briefly complied with the no majority requirement after implementing the desegregation plan; and (2) the School board had been generally uncooperative. The Supreme Court, ultimately, reversed the District Court, holding it had exceeded its authority by requiring attendance zones adjustments as an indication of compliance with the no majority requirement. According to the Court, a modification of the requirement should have been granted.[23] The case was remanded to the Court of Appeals for reconsideration.

In effect the Supreme Court, *Spangler*, ruled that the District Court had gone beyond what the Court had approved in *Swann*. The point is, the court saw its order not as a beginning in the process of shaping a remedy, which *Swann* indicated would be appropriate, but as an inflexible requirement to be applied each year within the attendance zone of each school. In *Swann*, the Court had disallowed orders that required annual adjustments of the racial composition of the student population if those adjustments extended beyond the point at which "the affirmative duty to desegregate has been accomplished and racial inbalance through official action is eliminated from the system."[24] Finally, the Court stated that once a unitary system had been achieved, further judicial intervention would be warranted only if deliberate action by state officials had a negative effect on the racial composition of the school.[25]

In *Spangler* and in its later interpretations of *Swann*, the Supreme Court held that successful implementation of a racially neutral attendance pattern discharged the affirmative duty of the school board with regard to attendance zones.[26] In the dissenting opinion, Justices Brennan and Marshall rejected the idea that the District Court had exceeded its authority. According to the dissenters, *Swann*'s denial of a year-by-year review attendance zone should take effect only upon achievement of a "fully desegregated school system."[27] The dissent (and a concurring opinion written by Justice) that the court's majority opinion of *Swann*, allowing a short-term compliance period to satisfy the school affirmative duty, might well adversely affect a school.[28] The dissent further argued that limiting the District Court's ability to fashion equitable remedies might well hinder the elimination of all state-imposed segregation.[29]

The Supreme Court decision in *Spangler* increased the constraints on the remedial powers of district courts in school desegregation cases. The majority holding in *Spangler* is "process-oriented" in its emphasis on the achievement of a "racially neutral system of student assignment."[30] The holding is "result-oriented" to the extent that any initial compliance may be remedially sufficient. In the past, advocates of integration supported the "result-oriented" approach because consideration of past discrimination gives courts greater latitude in fashioning remedies.

If the *Spangler* decision has any meaning for the future, it is that school districts in compliance one day, may be allowed to resegregate when demographic shifts are not attributable to the actions of school officials. Such a trend suggests that once desegregation of students is achieved school system discrimination attributable to official action is eliminated, school officials may no longer be required to make yearly alterations in student assignment plans in order to maintain a strict numerical ratio of majority and minority students.

Another case bearing on this question of official discrimination, *Washington v. Davis,*[31] does not, however, address the issue of school desegregation, per se. As part of its selection procedure for police academy recruits, the City of Washington, D. C., administered "Test 21," a test which was also used generally by the federal civil service to test verbal ability. It was shown that a passing score on the test correlated positively with successful completion of the course of study at the police academy. But no positive correlation between a passing score on the test and the quality of an applicant's on-the-job performance was shown. The Washington Police Department was actively seeking black recruits, and it had raised the percentage of black recruits to a level roughly equal to the percentage of twenty to twenty-nine year-old blacks in the area from which personnel were drawn.

The facts in *Washington v. Davis* did not require that the court identify what particular factors must be present to show an intent to discriminate. But Justice White, writing the majority opinion for the Supreme Court noted that the central question in the case was whether the defendants had purposefully sought to disqualify black applicants. Justice White acknowledged that in some instances, a dearth of blacks "may warrant an inference of purposeful discrimination or, at least, a shifting of the burden of proof to the state to explain such absence in racially neutral terms. "But," he continued, "this inquiry would still seem to focus upon the subjective state of mind of the public officials."[32] Justice Stevens raised a number of other questions:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally, the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of

> collective decision making, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker, or conversely, to invalidate other legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process.[33]

Is Stevens suggesting that the requisite "intent" should encompass more than a desire to cause certain results, even though the feared result is substantially certain to ensue? After *Davis*, the Court's message is inescapable: To characterize the differing effects of racially neutral state practices as "discrimination for equal protection purposes," there must be a finding of intent to cause the discriminatory effect. Thus, a test that is racially neutral on its face, and is administered without racially discriminatory action or intent, and is reasonably related to a legitimate purpose, is constitutional.

Even if foreseeability is a factor from which one can draw an inference of discriminatory intent, foreseeability of effect does not in itself seem sufficient to make out a case of de jure segregation.

For a subsequent Supreme Court decision which was vacated in light of *Washington v. Davis*, see *Austin Independent School District v. United States.*[34] The Court, relying on *Davis* remanded this case to the Court of Appeals for consideration in light of its decision in the *Davis* decision. In *Austin*, the Court agreed that there would be no need to address the issue of remedy if the Court of Appeals found that there has been no constitutional violation. The Supreme Court speculated on whether the Court of Appeals might have erred by impugning school officials more than the evidence justified and in ordering a desegregation plan far exceeding in scope any identifiable violations of constitutional rights.

The Court went on to state that the principal cause of racial and ethnic imbalance across the country lay in the imbalance in residential patterns. Such patterns, the Court pointed out, are typically beyond the control of school authorities. Economic pressures and voluntary preferences are the primary determinnants of residential patterns.

As matters now stand, pupil transportation is apparently permissible only when the evidence supports a finding that the extent of integration to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. A remedy simply is not equitable if it is disproportionate to the wrong. The Supreme Court elucidated this point in *Dayton Board of Education v. Brinkman.*[35]

In the *Brinkman* case the District Court found that the Dayton School Board had engaged in racial discrimination in the operation of the city's schools. The Court based its findings on three factors: (1) a substantial racial imbalance among the student bodies throughout the system; (2) the school board's use of optional high school attendance zones, which had a segregative effect; and (3) the school board's rescinding of a prior board's resolution acknowledging its own role in racial segregation and calling for remedial measures. The District Court, at the insistence of the Court of Appeals, ordered a system-wide remedy.

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The duty of both the District Court and the Court of Appeals in this case was to determine whether there was any action in the conduct of the school board that was intended to, and in fact, did discriminate against the staff and student body.[36] The point is, the remedy must be designed to redress the perniciousness that lay between intention and result. Only if there has been a system-wide impact would there be a system-wide remedy.

Thus, the Supreme Court remanded *Brinkman* so the District Court could establish whether other segregative acts of the school board could be established sufficient to warrant a remedy or whether a more limited order should be formulated. Pending a new determination, the District Court's present plan is to take effect. In December, 1977, a federal judge ruled that the plaintiff in the *Brinkman* case had not proven intentional racial segregation on the part of the Dayton Schools at least not to the extent the Supreme Court said was required when it sent the case back to the lower court in June. After lawyers for the NAACP asked the Court of Appeals to keep the city's desegregation in effect, the Court ruled that Dayton School officials must keep its desegregation plan in effect until it rules on the case for the second time.

In summary, the Supreme Court rulings in *Spangler*, *Davis*, *Austin*, and *Dayton* can and will be interpreted by many as a retreat from the initial *Brown* decision. This interpretation is understandable when one considers the confusion and questions that have resulted from the Court's holdings in these cases. But it is possible, too, to see these cases as small steps forward taken by an essentially conservative, judicially passive Court.

CONCLUSION

> A nation has a choice. It chooses itself at fateful forks in the road by turning left or right, by giving up something— and in giving up and the taking, in the deciding and not deciding, the nation becomes. And ever afterwards, the nation and the people are defined by the fork and by the decision that was not made there. For the decision, once made, engraves itself into the landscape; engraves itself into things, into institutions; nerves, muscles, tendons. . . .[37]

Inferences and conclusions about such subjective issues as school desegregation must, of course, be made within limitations; but at the same time the available data about desegregation demands serious, extended study. The author cannot say for sure that sustained pressure by the courts will increase support for school desegregation. But is does seem reasonable to argue that since *Brown I*, the nation's attitudinal change has been significant. This change is documented by the National Opinion Research Center's published results in the December, 1971, issue of *Scientific American*. In the realm of public education, the survey indicated that in 1970, seventy-five percent of all Americans said they favored integration, compared to only thirty percent in 1942. Only two percent of the whites in the South said they favored school integration in 1942; in 1956, fourteen percent said they favored it; in 1970, almost half of them said they favored it.

Furthermore, the assertion that "mandatory busing has contributed to the racial and economic segregation of our cities on a scale undreamed of in 1954,"[38] is oversimplistic and fails to take into consideration the numerous other factors that have influenced the movement of citizens from the cities. Finally, to assume that educators can solve the problems inherent in our society by themselves is to assume too much.

If a less troubled educational period is to emerge, it must be assisted by professional people and communities of good will guided by the basic social mandates of the Constitution and the *Brown* decisions.[39]

FOOTNOTES

[1] David L. Kirp, "Race, Politics and the Courts: School Desegregation in San Francisco," *Harvard Educational Review*, 46, November, 1976, p. 572.

[2] J. Skelly Wright, "Are The Courts Abandoning The Cities," *Journal of Law and Education*, 4, January, 1975, p. 218.

[3] Robert Green, GuuEugenia Smith, John H. Schweitzer, "Busing and the Multiracial Classroom," *Phi Delta KaPpan*, May, 1972, p. 543.

[4] 347 U.S. 483 (1954)

[5] Green supra note 3 at 543.

[6] 349 U.S. 294 (1955)

[7] 153 U.S. 537 (1896)

[8] 339 U.S. 629 (1949)

[9] Daniel, *Bible* (Kings James Version) 5:25-8, each of the Aramaic words indicated that the days of the Babylonian Kingdom were found lacking and would soon fall.

[10] *Brown V. Board of Education of Topeka*, 98F. Supp. 797 (D. Kan. 1951), *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C., 1952); *Davis v. County School Board*, 103 F. supp. 337 (E.D.Va. 1952). *Gebhart v. Belton*, 91 A 2d. 137 (1952).

[11] 347 U. S. at 495.

[12] 391 U. S. 438 (1968)

[13] *Id.* at 430.

[14] *Swann v. Charlotte-Mecklenburg Board of Education*, 399 U. S. 926 (1970)

[15] 311 F. Supp. 265, 268 (W.D.N.C.) rev'd in part, 431, F.2d 138 (4th Cir. 1970) district court opinion reinstated, 40 2 U.S. (1971).

[16] 413 U. S. 189 (1973)

[17] 418 U. S. 717 (1974)

[18] 379 F. Supp. 410 (1974)

[19] Thomas Fraser Pettigrew, "Exploring the Future: Race Relations in the 21st Century," *Journal of Law and Education*, 4, January, 1975, p.39.

[20] 427 U.S. 425 (1976)

[21] *Id.* at 427.

[22] *Id.* at 438.

[23] 402 U. S. 31-32 (1971)

[24] *Id.* at 32.

[25] 427 U.S. at 436-437

[26] *Id.* at 443.

[27] *Id.* at 442-43

[28] *Id.* at 444.

[29] *Id.* at437

[30] 96 S. Ct. 2040 (1976)

[31] 426 U. S. 229 (1976)

[32] *Id.* at253

[33] 45 U.S.L.W. 3413 (1976)

[34] 45 U.S.L.W. 4910 (1977)

[35] See *Washington v. Davis*

[36] Jerone Bennett, Jr., *The Shaping of Black America*, (Chicago: Johnson Publishing Company, Inc., 1975) p.61.

[37] Louis Rubin, ed., *The Future of Education: Perspectives on Tomorrow's Schooling*, (Boston, Allyn and Bacon, 1975) pp.107-11.

[38] David G. Carter, The Case Against Separate Schools, The Clearing House, November, 1977, p. 129.

U.S. v. BOARD OF SCHOOL COMMISSIONERS, INDIANAPOLIS: A CASE IN POINT

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The author presents the history of the litigation evolving out of this ten year-old school desegregation case. Aquila discusses the following five phases: (1) judgment, (2) remedy, (3) interdistrict remedy, (4) appeal of interdistrict remedy, and (5) present status of the case. An historical review of Indiana's position on school desegregation sheds light on the complexities of the long-standing case; a description of the activities of certain municipal agencies provides some insight into the difficulties thus far encountered in effecting a successful desegregation plan. The author concludes by describing in some detail the city-only desegregation plan proposed for the coming academic year, which consists of these innovative changes: (1) an options education program at the elementary level; (2) new junior high school districts at the intermediate level; and (3) a magnet school with a lottery approach at the high school level. Recent developments (Summer, 1978) are included in an afterward.

INTRODUCTION

Segregation of American schools has within it the seeds to destroy the American educational system and to undermine the basis underlying our nation's origin. This is not an alarmist outcry; rather it is my perception of one alternate American future. In light of the recent shift in Supreme Court interpretation, recent northern and western school desegregation activity has the potential to recreate the dual school system.

We now find an urban school system composed of blacks and browns. This urban core is surrounded by a suburban ring of schools with only whites. Resegregation has exaggerated the problem with attitudes hardening on both sides. The sixties had protests, bus burnings and similar problems. Below the surface the seventies auger an even greater danger. I suggest that peaceful desegregation demands the singular application of all of our country's vast resources for the resolution of this social inequity.

At the local level those involved in the Indianapolis public school's (IPS) desegregation case are accustomed to frustration, to delay, and to a situation which is as insoluble as the present web of misdirection, inaction, and lack of progress which seems to characterize the provision of equal educational opportunity. Three different desegregation plans have been suggested since the case was initiated in l968, with still another now being proposed by the new school board. The time lapse since the initial filing of the case has caused the public to question whether a resolution of the problem will ever be accomplished.

The new school board favors desegregation although it does oppose the court's metropolitan remedy because this calls for one-way busing which imposes an undue hardship on the black children being bused to the suburbs. The board members' action to initiate an Indianapolis-only desegregation plan is a courageous one, not because they decided to act but rather because of the exciting new possibilities of their plan.

There may be problems caused by too rapid system-wide implementation. Yet, the manner in which they are applying educational theories to an actual desegregation situation is revolutionary. Nowhere in the country has it been attempted in a similar fashion. At the high school level the magnet plan combined with a lottery program to guarantee court-mandated racial balance guidelines is not new. Nor is the creation of new junior high schools as a desegregation tool. It is at the elementary level—where parental concern is always most intensely focused—that the options plan is a new and exciting approach. The educational soundness of providing optional learning styles which accommodate the different ways children learn is unquestioned. Certainly, the logistics involved in the implementation process must be addressed carefully; but it is most assuredly worth the effort.

PROLOGUE

The Indianapolis school desegregation case is now the longest, active northern school desegregation suit, originally being filed in 1968. The Indianapolis Board of School Commissioners, the defendants, were found guilty of violating the equal protection clause of the Fourteenth Amendment of the U.S. Constitution through the practice of de jure racial segregation of students. (*United States v. Board of School Commissioners.*, Indianapolis, Ind., 332 F.Supp. 655 (S. D. Ind.) (1971)). This ruling made by Judge S. Hugh Dillin was appealed to the Seventh Circuit Court of Appeals by the defendant. The Seventh Circuit affirmed the lower court ruling, and initial appeal to the Supreme Court led to a denial of certiorari in 1973. (474 F.2d 81 (7 Cir.), cert. den. 413 U.S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1941 (1973). The Supreme Court ruling in *Milliken v. Bradley* (418 U.S. 717 (1974)) led to a further appeal and evidentiary hearing regarding a metropolitan remedy.

The Supreme Court has again remanded the case back to the Seventh Circuit Court of Appeals for review in light of the *Washington v. Davis* and the Arlington Heights cases. The case, has, therefore, been reviewed by the Seventh Circuit on four different occasions. The Seventh Circuit has sent the case back to Judge Dillin for his reconsideration, attaching several advisory comments. These comments will add to his task of reviewing the case especially with the more recent actions of the Supreme Court.

During the long history of the litigation, the composition of the Board of School Commissioners has changed. The present majority actively supports the elimination of the segregative conditions. All seven Indianapolis school board commissioners are elected at one time but only four serve the first two years. Thus there will be three new members joining the board with the 1979 school term. At the time all seven board members who were elected in the 1976 election will serve at the same time. All seven members will then be of a similar position regarding the school desegregation case.

The present board has adopted a position opposing Judge Dillin's ruling which calls for the one-way busing of black children. It is their position that this places an undue hardship upon those who have been discriminated against. The board has also encouraged the development of the options program. This program is one of the newest, most exciting attempts to desegregate, especially at the elementary level, that the author has ever encountered. In addition to an educational options plan at the elementary level, there will be newly created junior high school zones and a magnet school program at the high school level.

HISTORY OF THE LITIGATION

To date there have been five phases to the Indianapolis school desegregation case. These phases are: (1) Judgement, (2) Remedy, (3) Interdistrict remedy, (4) Appeal of interdistrict remedy, (5) Present status. Each phase will be discussed below, as will the possible options available to the district court.

Judgement: The first segment of the Indianapolis case was the finding of racial segregation within the Indianapolis Public Schools. This was the sole issue of contention during the initial phase. Judge Dillin, Federal District Judge for the Southern District of Indiana, reviewed the past history of the Indianapolis public schools since 1949, the year that Indiana made segregation through the use of a dual school system an illegal state policy. Judge Dillin ruled the Indianapolis school district was guilty of de jure segregation. At that time, he ordered the United States Justice Department to add other school districts in the metropolitan area as additional defendants. This was done in order to provide the setting necessary for consideration of a metropolitan remedy. Additionally, the Buckley children were added as plaintiffs. This was necessary as they represented a class of black school children being discriminated against within the Indianapolis Public Schools (IPS). The intervening plaintiffs were added at the same time that additional defendants, school districts and officials, were added.

Indianapolis appealed the decision of the federal district court. On appeal, the Seventh Circuit concurred with Judge Dillin, finding that there was "a clear pattern of purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools and in school construction and placement. There was a pattern of decision making which. . . . .reflected a successful plan for de jure segregation." (474 F.2d. 81 (7 Cir.), July 16, 1976, pg. 3)

Remedy: After the finding of illegal segregation, the court dealt with the fashioning of a remedy to overcome the de jure segregation. A major issue was the constitutionality of the Uni-Gov Act. The court ordered the remedy without actually deciding the question of Uni-Gov. It felt that a desegregation plan with a possibility of being effective could not be accomplished within the boundaries of IPS. This finding was based on evidence that in any given school district when the percentage of blacks approaches 25-%, a phenomenon called "white flight" occurs. As the rate of white migration accelerates, the result is resegregation. The court also found that the state of Indiana, its officials and agencies through their actions and omissions, promoted segregation and inhibited the efforts for desegregation. Because the State is ultimately charged under Indiana law with the operation of all public schools, it had a continuing affirmative duty to desegregate the Indianapolis school system.

The court, therefore, ordered a broad interdistrict remedy which involved the entire metropolitan area to include school districts outside of Marion County. The federal district court held that it was the duty of the State, through the General Assembly, to devise a plan for desegregation. If the State failed in this regard, the court held that it could formulate its own plan. As an interim relief measure, the court ordered IPS to effect a pupil reassignment program during the 1973-74 school year. The purpose of this action was to ensure a fifteen percent enrollment of black pupils in each of its elementary schools.

In response to the court's order, IPS submitted a desegregation plan. The court rejected this Plan as inadequate, appointing a two-member commission to develop another plan. The two individuals were Dr. Charles Glatt, Ohio State University, and Dr. Joseph Taylor, Indiana University-Purdue University at Indianapolis. Their plan was approved by the court and a major portion of that plan was implemented.

The court also ordered IPS to transfer to the defendant school districts a certain number of black pupils which would be equal to five percent of the 1972-73 enrollment of the transferee school. Pike and Washington Township were excluded from the initial phase because of increasing minority enrollments. This latter portion of the court's order regarding transfer of students to suburban schools was stayed because of subsequent appeal actions. The court's plan calling for one-way busing of black children has been the subject of criticism because of the fact that it placed an unfair burden on the victims of the discrimination.

Interdistrict Remedy: During the third phase of the suit, the court issued supplementary opinions recommending certain actions by the state of Indiana. In response, the General Assembly adopted a bill which provided for a tuition adjustment between transferring and receiving districts. A reimbursement of transportation costs would be made by the State when a federal or state court issued certain findings, (Indiana Statute, Acts 1974, P.L. 94, Para 1; I.C. 1971, 20-8.1-6.5-1 Burns Ind. Stat Ann Para 28-5031 (1971)).

The Seventh Circuit affirmed the two-member commission's interim desegregation plan. It also affirmed Judge Dillin's holding that the State of Indiana, as the ultimate body charged with the operation of public schools, "has an affirmative duty to assist the IPS Board in desegregating within its boundaries." (United States v. Board of School Commissioners, 503 F.2d 68, 80 (7th Cir. 1974), cert. denied, 421 U.S. 929). The *Milliken v. Bradley* decision (418 U.S. 717 (1974)) had just been issued by the Supreme Court when Judge Dillin's holding was affirmed by the Seventh Circuit. Because of this, the Seventh Circuit reversed Judge Dillin's order requiring an interdistrict remedy outside of Uni-Gov. This action released those school districts outside of Marion County from the court case. That portion of the order which pertained to the interdistrict remedy within Uni-Gov was vacated and remanded for further proceedings. The district court would then decide whether the establishment of the Uni-Gov boundaries, without a similar establishment of IPS boundaries for the same area, warranted an interdistrict remedy in accordance with *Milliken*.

Appeal Of Interdistrict Remedy: The fourth phase of the case involves the most recent ruling by Judge Dillin. He found that the State was guilty of inhibiting desegregation because the General Assembly, by expressly eliminating the schools from consideration under Uni-Gov, signaled its lack of concern for the whole problem, and thus inhibited desegregation of IPS. He further stated that the suburban Marion County school districts had resisted civil annexation so long as civil annexation carried school annexation with it. They ceased this resistance only when the Uni-Gov Act made it clear that the schools would not be involved (474 F.2d.81 (7th Cir.), 1976).

Additionally, he found that the suburban districts resisted the development of public housing projects by refusing to cooperate with HUD on the location of these projects. Their efforts were designed to discourage blacks from purchasing or renting homes in the suburbs. As a final point, he noted that the Housing Authority of the City of Indianapolis (HACI) actively avoided locating HACI public housing outside of IPS territories. In fact, in several instances these projects were developed just across the street from territory served by a suburban school corporation.

HACI did have certain countywide zoning restrictions during the construction of ten of the eleven housing projects. But HACI, at all times, had the authority to erect public housing in IPS territory and within five miles of the corporate limits of Indianapolis. Because the location of public housing tends to cause and perpetuate segregation of IPS pupils, this instrumentality of the State and, therefore, the state of Indiana was found guilty of perpetuating segregation.

Thus, in this phase of the court decision, the federal district judge ruled that an interdistrict remedy was necessary to effect desegregation within IPS. He again pointed out that if desegregation were limited to IPS, the district would become forty-two percent black and this percentage exceeded the tipping point at which resegregation would appear. Judge Dillin then ordered the transfer of 6,533 black students from IPS to other school districts in Marion County. During the second year of the plan, an additional 3,000 students were to be transported. This would raise the proportion of black students in the suburban districts to fifteen percent. IPS would be obliged to pay suburban districts the cost of educating the transferred pupils. Again, Washington and Pike Township school districts were left out of the order since they already had black populations of twelve and four percent, respectively. Additionally, the court ordered the Housing Authority not to build any new housing projects in IPS territory and not to renovate an all-black project (Lockfield Gardens was being considered for renovation.). The Buckleys were also awarded attorney fees. And, of course, all defendants then appealed. The school districts challenged the interdistrict transfers while HACI challenged the injunction against it. The U.S. Justice Department argued that the finding of interdistrict violation should be sustained but sought modification of the portion of the order calling for mandatory interdistrict transfers. It argued for affirming the injunction against the Housing Authority.

Present Status: During the summer of 1977, the Supreme Court remanded back to the Seventh Circuit Court of Appeals the Indianapolis case for further consideration. The Court stated that the three- judge appeal panel should consider its findings in light of two more recent court decisions, the *Washington v. Davis* case and the Arlington Heights case. The *Washington v. Davis Case* concerned discriminatory intent and the Arlington Heights Case concerned suburban housing patterns, both key issues in the Indianapolis case.

After a protracted period, the Seventh Circuit on February 18, 1978 tossed the case back into the lap of Federal Judge S. Hugh Dillin for further hearings. In addition, they proffered certain recommendations based on further analysis of the case. In effect, this may lead to another evidentiary hearing called by Judge Dillin to determine whether illegal discrimination occurred the Indianapolis Public Schools. The effect of the two recent Supreme Court decisions requires that, in essence, there must be proof that the segregatory effect of government officials' actions was a result of prior intent to discriminate. The word "intent" is the operative word. Establishing proof of intent is what caused the difficulty for the Appellate Court. The U.S. Justice Department has taken the position that the discrimination does not meet the "invidious discriminations" standard established for a metropolitan remedy.

Judge Dillin will need to determine whether the formation of Uni-Gov, the restriction of public housing projects to the central city, and those other actions which confine the black population to the city school system were based on a discriminatory intent. One view holds that it is not necessary to

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prove a subjective prior motivation of state officials. This school of thought believes that such a test "would pose an inpenetrable evidentiary barrier for plaintiffs, for in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find." (*Indianapolis News*, 2-17-78, page 4).

Possible Actions of the District Court: Now that the case is back in the hands of Judge Dillin, he will have several options. He may review the record of the case and conclude that the intent requirement cannot be satisfied. He will thus dismiss the case and the suburban school system will be released from the litigation. If he does this, the Indianapolis Public Schools will then have to desegregate within the boundaries of IPS alone. This is similar to what has occurred in Detroit, Michigan.

The second option would be for Judge Dillin to reopen the case to evidentiary hearings. It would then be up to the attorneys for the plaintiffs to produce more evidence to substantiate the intent to discriminate on the part of suburban districts. Obviously, this would require prolonged litigation, and if past history is a precedent, further appeals would follow.

The third option, one that has not been considered in recent years, is for Dillin to work toward an out-of-court settlement. This may occur since Judge Dillin has attempted an out-of-court settlement on several occasions. In recent months, prior to the Supreme Court's action to remand the Indianapolis case back to the Seventh Circuit, there had been a dialogue among the attorneys for the Metropolitan School Districts and the Indianapolis Public School district focused on considering an out-of-court settlement. There are several possibilities for such a settlement. A simple method would be for the suburban schools to annex certain public housing projects on the periphery of the IPS, which would avoid the busing issue as well as the interdistrict actions. A further advantage is that tuition exchange payments would not be involved, thus relieving IPS of a financial liability while at the same time avoiding the distasteful one-way busing to which the new school board seems strongly opposed. This would also allow the school board to continue with its IPS-only desegregation plan which involves magnets at the high school level, the elementary school options plan, and the creation of junior high schools.

BACKGROUND INFORMATION

Historical Review: The state law of Indiana before 1869 prohibited blacks from attending public schools. The Indianapolis public school system enforced that state law, as did all city schools in Indiana. In 1868 with the ratification of the Fourteenth Amendment to the U.S. Constitution, Indiana law was amended so as to allow blacks to attend public schools (Chapter 16, Para 2, (1869) Ind. Acts 41 repealed (1949)). The Indiana Supreme Court soon ruled that this law did not entitle black students to attend school unless a *black* public school was available in the district. Therefore, the law did not entitle black students to attend white schools (*Cory v. Carter*, 48 Ind. 327, (1874)). This policy of separate schools for blacks and whites which was required by state law prevailed in Indiana until it was officially abolished by the Indiana General Assembly in 1949 (Ch. 186, Para. 1 (1949) Ind. Acts 603, repealed (1973)).

Thus, the Indianapolis Public Schools operated a dual system of public education from 1869 onward, and a segregated public educational system was the official policy of the Indianapolis public schools from 1849 to 1949. It was the finding of Judge Dillin that this dual system was maintained, in fact, long after 1949 and even after *Brown*[1] (347 U.S. 483 (1954)).

The dual school system extended to the high school level from 1927 onward when Crispus Attucks High School was opened as the city's all-black high school. Prior to 1927 blacks attended their neighborhood high school, but after 1927 all blacks were required to attend Crispus Attucks. It is interesting to note that the black students attending Crispus Attucks had to ride in streetcars, buses and other facilities for long periods of time, often more than an hour one way in order to attend high school.

There was considerable support for the construction of Crispus Attucks in the black community. Of course, this is understandable for many reasons in 1927, not the least of which was because it created teaching positions for blacks. Prior to the opening of Crispus Attucks, blacks were not permitted to teach in the high schools of Indianapolis.

Demographic Information:

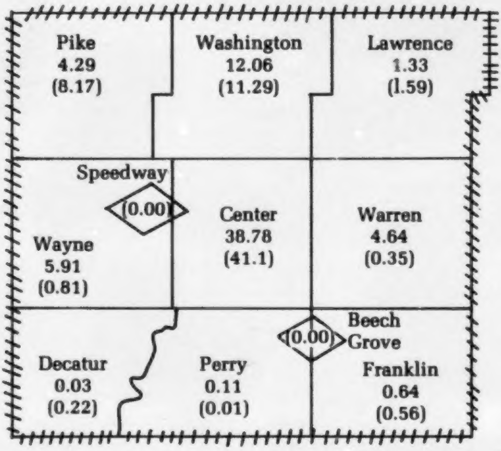
1) When Uni-Gov was created in 1969, ninety-five percent of the minorities in Marion County lived in Indianapolis. Since then the black population has continued to grow within the core city. At the same time the proportion of black students in IPS has increased from thirty-six percent in 1968 to forty-two percent in 1975.

2) The black-white ratio in IPS in 1974-1975 was fifty-seven white to forty-two percent black. This compares to an over-all ratio for Marion County of seventy-five percent white to twenty-five percent black.

3) The percentage of black students and black residents in Marion County by district is indicated in the following map.

The Black population in Marion County is reflected by the following.

1973
Percentage of Black Residents in Marion County
(Percentage of Black Students in Marion County Schools)


Pike
4.29
(8.17)
Washington
12.06
(11.29)
Lawrence
1.33
(1.59)
Speedway
(0.00)
Center
38.78
(41.1)
Warren
4.64
(0.35)
Wayne
5.91
(0.81)
Beech
Grove
(0.00)
Decatur
0.03
(0.22)
Perry
0.11
(0.01)
Franklin
0.64
(0.56)

4) For the school year 1974-75 the racial composition of the suburban Marion County district was as follows:

Township	Percentage of White	Percentage of Black
Decatur	99.83	.90
Franklin	99.35	.54
Lawrence	95.50	2.90
Perry	98.64	.23
Warren	98.61	.73
Wayne	97.87	1.19
Beech Grove	99.64	.04
Speedway	99.10	.72

Uni-Gov:

1) Until 1969 the boundaries for IPS generally corresponded to the boundaries of the city of Indianapolis. The other Marion County schools, therefore, were then truly suburban in nature. In 1969 the so-called Uni-Gov Act, officially the "First Class Consolidated Cities and Counties Act," (Acts 1969, Ch. 173, Para 101; I.C. 1971, 18-4-1-1 et seq., Burns Ind. Stat. Ann. 48-9101 et seq. (1971))

transformed Marion County into a consolidated metropolitan government. Specially excluded from Uni-Gov were the suburban school districts. A consolidated school district corresponding to the metropolitan government boundaries was not established with each suburban school system retaining its historical boundary lines.

2) Uni-Gov is governed by a mayor and council. Its purpose is to efficiently reorganize civil government on a county basis. Previous to Uni-Gov there had been various governmental responsibilities with overlapping jurisdictions throughout the Marion County area. With Uni-Gov, municipal services such as police and fire protection are provided district wide. The exclusion of schools thus becomes a major issue in court litigation.

3) Uni-Gov has not replaced all previous governmental units in Marion County. There is still an Airport Authority, Building Authority, county courts and hospital corporation which are excluded from Uni-Gov. Additionally, excluded towns such as Speedway, Perry and Lawrence retain their local governments and provide municipal services in various areas. Nevertheless, Uni-Gov has extensive powers even in the exluded towns. For example, it handles air pollution regulations, building code enforcement, municipal planning and thoroughfare control. Additionally, the citizens, even in the excluded towns, vote in the Uni-Gov elections.

Housing Authority for the City of Indianapolis:

1) The Housing Authority for the City of Indianapolis (HACI) built for occupancy ten housing projects for low-income families between 1966 and 1970. These ten projects and one other, Lockfield Gardens (this being one of the first public housing projects built during the Depression) are the only public housing projects available for occupancy in Marion County.

2) All ten public housing projects were built within the boundaries of IPS. When they were opened, there was fifty to seventy-five percent black occupancy. Now these projects are more than ninety-eight percent black.

3) Under Indiana State law, HACI has the authority to construct projects within Indianapolis as well as five miles outside of the city boundaries. Federal funding can only be obtained if HACI enters into a cooperative agreement with the municipality or other governmental entity which has jursidiction over the territory. While the city of Indianapolis has entered into such an agreement, at no time have the county units of government agreed to allow a housing project to be built in their territory.

4) Since Uni-Gov in 1964, the HACI has had the authority to construct projects outside the old city limits (with the exception of the excluded towns of Speedway, Beech Grove and Lawrence). After Uni-Gov there was no need for cooperative agreements. Yet, no housing projects have been built during this period of time. While there is no evidence as to the reason for this, it is known that there are over 3,000 applicants for family housing pending.

5) While HACI claimed that there were no suitable sites outside of Indianapolis because services such as public transportation were not available, the evidence does not support this contention. Public transportation routes could

easily have been extended, on a showing of need, as could food stamp distribution centers and other services. Surprisingly, six of the ten housing projects were built on IPS outer boundary lines, some within a few blocks of a joint IPS/metropolitan boundary line. In some cases the location of the housing projects on one side of the street dictated that all students in the housing project attended IPS while students living across the street would go to a metropolitan district school.

School District Boundaries:

1) Until 1969, because of various laws, noted below, IPS boundaries were largely coterminous with city boundaries. Under a 1931 act the boundaries of IPS were made coterminous with those of the city. (Acts 1931, Ch. 94, 1; I.X. 1971, 20-3-11-1, Burns Ind. Stat. Ann. 28-2601 (1971)). Boundaries of school districts and muncipalities until 1959 were also coterminous in Indiana, although there were some exceptions. Thus, IPS boundaries merely reflected generally prevailing conditions.

2) In 1959 the Indiana School Reorganization Act, (Acts 1959, ch. 202, 1; I.C. 1971, 20-4-1-1 et seq., Burns Ind. Stat. Ann. 28-3501, n (1941)) created a complex scheme for consolidating school districts. Consolidations under this act reduced the number of school districts outside Marion County from 990 to 305. Thereafter, seventy percent of the reorganized districts were no longer coterminous with other units of civil government. In fact, some districts even crossed county lines.

3) Marion County, however, was an exception. School districts in Marion County were not consolidated, even though the Marion County Reorganization Committee, appointed pursuant to the act, initially recommended that all city systems in the county be merged into one. There was unanimous opposition from the suburban school districts. This opposition led to the defeat of the merger proposal. The court has stated that there is no evidence that this opposition was racially motivated. (There is some doubt in the author's mind, although proving racial intent behind suburban school districts' actions will prove difficult). The most substantial reasons given for vetoing the merger proposal were: (1) the size of the merged district and (2) increased school taxes in IPS and two of the suburban districts. Therefore, while the arguments in favor of the single-district merger plan outweighed the opposing arguments, the committee reversed itself and proposed a plan which froze existing school corporations in Marion County according to the existing 1961 boundaries. Thus, the plan adopted in 1962 after approval by the State made no significant boundary changes in Marion County, leaving those boundaries coterminous with those of civil government.

4) As a result of the 1959 Reorganization Act, school boundaries in most of Indiana were frozen and, therefore, unaffected by municipal annexation. Special legislation was enacted in 1961 to give schools within Marion County flexibility lost by the 1959 reorganization. Under the 1961 act, extension of the boundaries of the civil city automatically ended the corresponding school boundaries unless

the school city and the losing school corporation mutually agreed that the city school territory would not expand with the civil city. The school district losing territory could also oppose the annexation in the remonstration suit.

These annexation powers thus proved to be illusory, as they were effectively hindered by remonstrance litigation. Therefore, until 1969 the combined action of the State of Indiana political subdivisions (in Marion County) had the effect of leaving the boundaries of Indianapolis and IPS substantively the same despite school districts' consolidations made under the 1959 act. It was expressed in the 1961 legislation that IPS would extend along with the city. At least, this was the intent. Sixteen days before Uni-Gov was adopted, an act was passed amending the 1961 act by abolishing the power of IPS to follow municipal annexation.

Appeal Considerations:

1) The question of appeal by the Seventh Circuit and now by Judge Dillin surrounds the issue of whether the interdistrict remedy ordered by the Federal District Court is supported by the record and the legal principles enunciated in *Milliken v. Bradley*. The two major issues under contention are: (1) whether the establishment of Uni-Gov boundaries without a similar establishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined the Housing Authority of the City of Indianapolis from locating additional public housing projects within IPS or from renovating existing housing facilities.

2) Several major issues established by the court regarding *Milliken* have relevance for the IPS desegregation case:

a) The controlling principle enunciated in *Swann* (402 US 16) is that the scope of the remedy should be determined by the nature and extent of the constitutional violation that has occurred. Therefore, before boundaries of autonomous school districts may be set aside by consolidation through a cross-district remedy, it must be proven that there has been a constitutional violation within one district that produces segregative effects of significance in other districts.

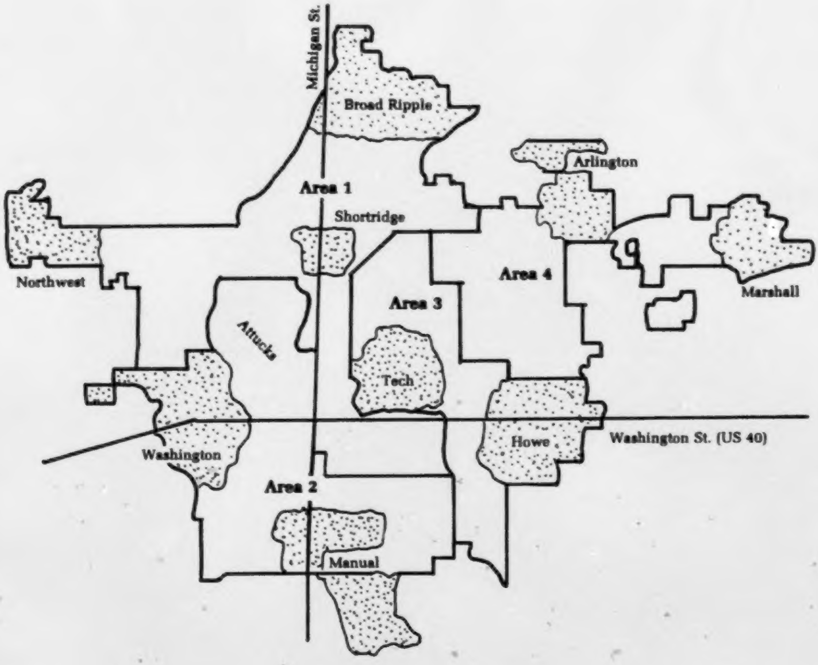
b) Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been substantial cause of the segregation. Therefore, in certain circumstances, an interdistrict remedy would be appropriate to eliminate the district segregation caused by the constitutional violation; likewise, without an interdistrict violation with an interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy (*Milliken v. Bradley*, 418 US 717, 744-45).

IPS-ONLY DESEGREGATION PLAN

The Indianapolis Public School system has filed a motion urging Judge Dillin to approve a city-only school desegregation plan which it wishes to implement next fall, regardless of the outcome regarding a metropolitan remedy.

It is the contention of IPS that this city-only remedy is compatible with the inclusion of suburban schools if a multi-district remedy is effected. The IPS-only plan is basically a sixty-to-forty percent racial balance plan. The plan has three components including: (1) an options education program at the elementary school level; (2) new junior high school districts at the intermediate level; and (3) a magnet school with a lottery approach at the high school level.

City-Only School Plan


Michigan St.
Broad Ripple
Arlington
Area 1
Shortridge
Northwest
Area 4
Marshall
Area 3
Attucks
Tech
Washington St. (US 40)
Howe
Washington
Area 2
Manual

This map describes the city-only desegregation plan. The city is divided into four attendance areas. Students who live in the shaded areas around the high schools may attend those schools. Those outside of the shaded areas would participate in the lottery and would be permitted their first choice from among high schools in their attendance zone, as long as racial balance of the schools is within the sixty-to-forty percent range.

This high school plan, intended to be introduced beginning with next year's ninth grade class, also calls for special magnet programs. Because of their curricula, design, and special appeal, the magnets should draw students from across the city on a full or a part-time basis and would achieve the racial balance requirements established by the court. These programs include a career education magnet at Arsenal Technical High School, a fine and performing arts magnet at Shortridge High School, and a health professions magnet at Crispus Attucks High School. The school board plans to create in each of the four high school attendance areas new junior high schools to which students would be assigned, this selection serving the goal of desegregation.

Option Plan: It is at the elementary level that the plan is most interesting and most difficult for parents to understand and, in some cases, to accept. Some factors which elicit parental concerns are the age of the children involved, fears about safety, and a strong identification with their own neighborhood. Elementary pupil assignments will be determined by a combination of factors, including the high school attendance area in which they live, the educational options choice which parents and pupils make in March and April, 1978, and the racial balance standards established by the court for each school building in the system. This standard calls for a sixty- forty percent white/black balance in each school.

The Indianapolis public schools have moved forward and intend to implement their city-only desegregation plan system-wide in the fall. It should be understood that prior to implementation the IPS must receive the approval of Judge Dillin, without whose approval all of their actions and efforts are for naught.

The core of the elementary desegregation plan is the encouragement of parents to select an educational option for their child. An intensive community relations and publicity program has been developed in order to inform the community about the several options. There is a concern on the part of some members of the community, especially the minority community, that this public relations effort was initiated too late. The options elementary programs which are available include: (1) Back-to-Basics; (2) Traditional; (3) Continuous Progress; (4) Open Concept; (5) Montessori; (6) Developmental; and (7) An Alternate Choice.

Option No. 1: Back-To-Basics: This is an educational program which emphasizes the three R's of reading, writing, and arithmetic. Strong discipline and an adherence to a value system is encouraged. The program calls for the following:

1. Completely self-contained classroom
2. Schedule of instruction is the same for each student
3. Six grade levels per school
4. Grades 1,2, and 3 stress 3 R's, geography and physical education
5. Grades 4,5, and 6 stress 3 R's, history, geography, science, music, art, and character education.

The back-to-basics option would have a classroom which requires: (1) emphasis on drill, recitation, and phonics, (2) no experimentation in instruction, (3) letter grades given in all subjects based on tests, (4) daily homework at all grade levels, (5) completion of all grade level work for promotion, and (6) strong parent support for homework, dress code, and behavior code. A student attending the back-to-basics option would spend one-half to three quarters of his/her day with reading, writing, and arithmetic. One teacher would present all subjects to the whole class all day.

Option No. 2: Traditional: This is an education program which emphasizes academic instruction and personal development through the teaching of all academic subjects in one classroom; it is basically a teacher-centered instructional program. The following would be typical of the traditional program:

1. Teacher uses varied instructional methods
2. Uniform time allocation for subjects
3. Students are placed in sub-groups in classroom based on achievement of the subject area, personal development, teacher judgment.
4. Six grade levels per school, self-contained classrooms except for special subject areas

The traditional classroom would provide: (1) emphasis on developing subject areas, (2) mainly large group, some small group and individual study groups in self-contained classroom, (3) emphasis on activities which promote social growth as well as subject matter, (4) grading based on teacher judgment of mastery, (5) varied homework at different grade levels, and (6) promotion based on achievement and personal development of child. A typical day for an elementary child who has selected Option No. 2 would operate according to a regular time schedule within which set times are established for each subject area. Additionally, students would be divided into small groups for certain types of instruction.

Option No. 3: Continuous Progress: This is an educational program which requires the mastery of a defined curriculum, within which each student is allowed to progress at his/her own rate. The continuous progress option, a student-centered program, provides the following:

1. School divided into a primary division and an intermediate division
2. Stresses all subject areas
3. Students regrouped in academic subjects whenever necessary
4. Teaching directed to pupils' needs
5. Frequent evaluation of student progress

The continuous progress classroom presents a relatively different program from that of a traditional school. In this classroom: (1) teachers teach different groups of children, (2) there are fewer levels of instruction in each classroom, (3) students get more individualized instruction, (4) grades are based on achievement, (5) frequent reports are submitted to parents, (6) promotion is based on achievement and personal development of child, and (7) promotion occurs at end of primary and intermediate divisions. Typically, teachers would teach different levels of the subject area. Therefore, children have several teachers during the school day, instructing the children at the level at which they are achieving, with their interests in mind. A child would be involved with different students at different times of the day.

Option No. 4, Open Concept: This educational program emphasizes the needs of the individual student in each of his/her classes. An open concept is a non-graded approach and utilizes team teaching. This is basically a student-centered program involving:

1. Subjects based on child's interest
2. Students of different ages grouped in teams
3. Grouping for instruction in team area
4. Flexible schedule for instruction
5. Goals are set by teachers and students
6. No separate grade levels

Because team teaching is utilized the school environment does, in fact, operate non-traditionally. The team arrangement provides for (1) a wide variety of teaching methods, (2) many different types of materials, (3) no letter grades, teacher using checklists and comments, (4) homework given on an individual student basis, (5) no formal promotion with each student going to the next level of work when ready, (6) required parent-teacher-student report and conferences. In the open concept school the student works at his own pace and will spend as much time on a subject as he needs or wishes. Most important, a team of teachers will teach all subjects to a common group of students.

Option No. 5 Montessori: This is a highly publicized educational approach for teaching young children, based on a complete adjustment of intruction to the stages of a child's development. These are the main elements of the Montessori school option:

1. Grades 1-3 only in 1978-79
2. Students "work" with freedom of movement
3. Long blocks of time for learning and practicing activities
4. Non-graded
5. Emphasis on motor skills, sensory, cultural, and language experiences.

The Montessori school provides a student-centered environment which is different from the conventional including: (1) groupings by three-year age span, (2) choice and practice of activity which are self-motivated, (3) environment consisting of carefully constructed Montessori materials and instructional devices, (4) individual interests and self-satisfaction which are stimulated, and (5) programmed materials guide choices. Typically during the day the child will pursue selected activities individually and in small groups. A child selects an activity and "works" individually as long as he/she remains interested. Games, the use of equipment, general lessons, songs, and stories are all conducted as group activities.

Option No. 6, Developmental: This is an educational program which is based on decision-making by the students, giving them the opportunity to select that which they wish to learn. A developmental school is characterized by:

1. Freedom for each student - no schedule
2. Learning by doing - designing and completing projects
3. Student setting own learning goals and making own decisions
4. Frequent use of the community as a classroom

The developmental school may be categorized as a "social change" school. In this school one will find: (1) informal classrooms organized around student interests, (2) students of different ages in the same room, (3) frequent use of facilities away from the school, (4) teachers talking with one student or a very small group, and (5) no grades but rather progress reports given to parents and students during conferences, and (6) great flexibility in length of school day. During a typical day the child will work independently on projects in various parts of the school. As an example, a student may go to the library to research a topic. She/he could ask a teacher or friend for help or even leave the school environment to find additional information.

Option No. 7, An Alternate Choice: This is not an educational Option. Rather, it allows the parents to request that their child remain in the school presently attended. It should be realized (in some cases it is not understood, as yet) that the child will be allowed to remain in the same school *only* if this can be done within desegregation guidelines. Therefore, if a child wishes to attend his neighborhood school and that school is already sixty percent white or forty percent black, the student will be assigned to another building.

No parent is required to select an option for September, 1978. For those who do not, pupil assignment will be made in the same manner as in 1977, subject to the sixty-to-forty percent racial balance requirements of the desegregation plan. In 1979 a further opportunity to participate in the option selection procedure will be provided.

AFTERWARD

On April 7, 1978, Judge Dillin (1) ordered school officials not to engage many pupil reassignments for next fall, thus rejecting a city-only school desegregation plan for all grade levels and (2) in a separate one-page entry indicated that he did not plan to have additional evidentiary hearings on the issue of whether or not there is cause to involve the eight Marion County Township school systems in the desegregation remedy. Thus, he felt that there was already sufficient evidence on the record to send the case back to the Seventh Circuit Court of Appeals based on his previous funding of de jure segregation.

On May 10, 1978, the Indianapolis School Board passed a resolution indicating that the options education plan which was an integral part of the city-only desegregation plan vetoed by Judge Dillin would be implemented on a pilot basis. Implementation of the options plan on a pilot basis would not be contraindicated even in light of Judge Dillin's ruling. It is estimated that fewer than 1,000 children will be involved. Because of Judge Dillin's ruling, participation in the options program would be limited mainly to children who live "reasonably near" the pilot. Dillin's order prohibits desegregation of the school system until appeals are completed on the Judge's earlier order to bus over 9,500 students from the city to suburban school districts.

On May 30, 1978, Judge Dillin ordered a hearing to consider the merits of the proposed city-only school desegregation plan. This action was taken in direct response to the Seventh U.S. Circuit Court of Appeals which ordered him to reconsider his rejection of the Indianapolis plan. The Seventh Circuit therefore felt Judge Dillin should have a hearing to consider the merits of the city-only plan. Thus Judge Dillin would rule on the Constitutional merits of the city-plan regardless of the pending suburban issue which would be decided as a separate issue. On June 2, Judge Dillin ruled on the question of the city-only desegregation plan, allowing certain aspects of the plan to be implemented but finding that a city-only remedy would be impractical in light of the suburban issue yet to be resolved. In findings of fact he also pointed out and added a new wrinkle to the already extensive scope of this case. He cited the Indiana Transfer Act as authorization for the reassignment of students to the suburbs. This act was passed by the Indiana legislature in light of the monetary impact that the original ruling by Judge Dillin would have had. The Indianapolis School District would be made to bear the brunt of the cost for the students being assigned to the suburbs. The Transfer Act relieves Indianapolis of a portion of that monetary burden.

Now the three-judge panel of the Seventh Circuit Court of Appeals must act in order to move to a practical resolution to this case. The somewhat divided appeals court is now faced with several options. It may dismiss the suburban aspect of the case and order a city-only plan; or it may call for a new series of evidentiary hearings. Among the various options, it is quite probable that one of the two possibilities just mentioned will be the action taken by the court.

In response to the many options which Judge Dillin has opened to the Seventh Circuit Court of Appeals, the Indianapolis Public Schools has had to devise several desegregation plans. School board attorneys and the Planning Division must develop an inter-district plan as ordered by Judge Dillin. This county-wide remedy would have been put in effect in September if there had been no injunction or other action during the interim. IPS officials also continued to refine the city-only plan in light of the possibility that this plan might be ordered by the Seventh Circuit. The present status of the Indianapolis School Desegregation case is best stated in the seventeen-page memorandum issued by Judge Dillin July 11, 1978. Therein he urged the appeals court to expand its previous injunction against the construction of additional public housing projects in the boundaries of the Indianapolis Public Schools to include all government subsidized low-income housing. Further, he ruled that the state of Indiana has "an affirmative duty to assist in desegregating the Indianapolis Public Schools" and he ordered the State Superintendent of Public Instruction to develop a comprehensive in-service training program for all teachers and staffs in the nine-school system affected by the rulings in order to prepare for the reassignment of pupils. Additionally Dillin ruled that the reassignment of pupils take place during the coming 1978-79 school year.

On Friday, August 11, 1978, Judge Dillin ordered a stay in the case. This means that the metropolitan desegregation remedy ordered by the Judge in 1975 will again not be implemented in September. During the interim the Judge will hold additional evidentiary hearings. This is being done in response to the request of the Seventh Circuit Court. The time and date for these new hearings has not been established. One certainty is that there will be an opportunity for attorneys on all sides, the school district, the intervening plaintiffs and the suburban school districts to place additional information on the records. It will certainly be appropriate to review the Indianapolis case in light of the Wilmington case and the Dayton findings of 1976.

This action was taken by the Judge as a result of the three-judge appeals courts request that he reconsider his August 1, 1975, order to reassign pupils to surrounding school systems in light of several recent U.S. Supreme Court decisions dealing with desegregation. Those decisions have generally tightened the requirements requiring that the court find proof of discriminatory motivation or intent on the part of public school officials before ordering desegregation remedy.

Judge Dillin still believes that the Indianapolis school desegregation remedy lies in involving metropolitan one-way busing. Dillin felt that it was not necessary to make specific findings against suburban school officials to order the reassignment of pupils into their system. It was his belief that the acts of the General Assembly and other officials fully allow for the transfer of approximately 9,555 black pupils to surrounding school systems. Dillin stated that if housing projects had not been confined to IPS, the black pupils in those projects and in surrounding neighborhoods could have attended suburban school systems. He noted that legislatin passed by the General Assembly specifically authorized tuition transfer payments in the event pupils were reassigned from IPS to the suburbs. Additionally, there is another general pupil transfer law in Indiana which allows the parent of the child in one school system to apply for attendance in another school system if the parent feels the child may be better accommodated. Thus, with the General Assembly action, Judge Dillin feels that the court does not need to consider a Dayton-type rule wherein desegregation remedies would specifically fit proven violations.